United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

11-16-64
(2)

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 18,268

63

DART DRUG CORPORATION,

Appellant,

v.

PARKE, DAVIS & COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed January 11, 1962]

1.	Dart Drug Corporation (a Delaware Corporation) 5458 Third Street, N.E. Washington, D.C.	
2.	Dart Drug Corporation, 18th & Columbia Road (a Delaware Corporation)	
3.	Dart Drug Corporation of Maryland (a Maryland Corporation)	
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5.	Dart Distributing Corporation (a District of Columbia Corporation)	
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12.	Dart Drug Corporation, Wheaton (a Maryland Corporation)	

13. Coral Place Drugs, Inc.
(a Maryland Corporation)

14. Dart Drug Corporation, Eye Street
(a District of Columbia Corporation)

15. Dart Drug Corporation, G Street
(a District of Columbia Corporation)

Plaintiffs,

v.

Parke, Davis & Company
c/o Elliott Reinhardt
2114 Suitland Terrace, S.E.
Washington 20, D.C.
Apt. #202

Defendant

COMPLAINT - DAMAGES

Plaintiffs, by their attorneys bring this action against the defendant and complain and allege as follows:

Jurisdiction and Venue

1. This complaint is filed and the jurisdiction of this Court is invoked under the antitrust laws of the United States, and more particularly is brought under the authority of Section 4, 12 of the Act of Congress of October 15, 1914 (C. 323, 38 Stat. 730, 15 U.S.C. 15, 22) commonly known as the Clayton Act, for injuries sustained by plaintiff in its business and properties by reason of defendant's action in violation of Sections 1 and 3 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraint and monopolies", as amended, commonly known as the Sherman Act (15 U.S.C. 3).

2. Defendant Parke, Davis & Company is a corporation which transacts business, and is found within the District of Columbia.

Identity of the Parties

A. The Plaintiffs

3. (1) Plaintiff number 1, Dart Drug Corporation (a Delaware Corporation) organized March 25, 1960, and located at 5458 Third Street, N.E., Washington, D.C. is a holding company and as such it is owner

of 100% of the stock of each and every one of the other plaintiff corporations.

(2) Plaintiff number 2, formerly known as Dart Drug Corporation (a Delaware Corporation) was originally organized April 6, 1954 and at that time had one retail store at 18th and Columbia Road, N.W., Washington, D.C. The name of this corporation, plaintiff number 2, was formally changed and approved on March 2, 1960 to Dart Drug Corporation, 18th & Columbia Road. As originally known and as presently known, this corporation has continuously operated a retail drug store at 18th & Columbia Road, N.W. since May 20, 1954.

(3) Plaintiff number 3, Dart Drug Corporation of Maryland (a Maryland Corporation) was organized March 12, 1956 and has continuously since April 25, 1956 operated a retail drug store at 8511 Fenton Street, Silver Spring, Maryland.

(4) Plaintiff number 4, Dart Drug Corporation, Downtown (a District of Columbia Corporation) was organized July 18, 1957 and has continuously since September 9, 1957 operated a retail drug store at 828 - 14th Street, N.W., Washington, D.C.

(5) Plaintiff number 5, Dart Distributing Corporation (a District of Columbia Corporation) was organized April 8, 1958 and until March 25, 1960 it was a management corporation performing the functions now performed by Dart number 1.

(6) Plaintiff number 6, Dart Drug Corporation, Conn. & "K" (a District of Columbia Corporation) was organized September 30, 1958 and has continuously since that time operated a retail drug store at 1713 K Street, N.W., Washington, D.C.

(7) Plaintiff number 7, Dart Drug Corporation, Bethesda (a Maryland Corporation) was organized December 5, 1958 and has continuously since February 11, 1959 operated a retail drug store at 7227 Wisconsin Avenue, Bethesda, Maryland.

(8) Plaintiff number 8, Dart Drug Corporation, Alexandria (a Virginia Corporation) was organized March 16, 1959 and has continuously since May 20, 1959 operated a retail drug store at 700 King Street, Alexandria, Virginia.

(9) Plaintiff number 9, Dart Drug Corporation, 13th & F (a District of Columbia Corporation) was organized July 29, 1959. It was originally known as Dart Drug Corporation, 13th & E, however its name was changed to Dart Drug Corporation, 13th & F on May 17, 1961. This corporation has continuously operated a retail drug store at two successive locations at first at 1345 E Street, N.W. from September 9, 1959 to May 17, 1961 and second at 1323 F Street, N.W. from May 17, 1959 to the present.

(10) Plaintiff number 10, Dart Drug Corporation, 11th & E (a District of Columbia Corporation) was organized July 29, 1959 and has continuously operated a retail drug store at 11th & E Streets, N.W., Washington, D.C. since December 9, 1959.

(11) Plaintiff number 11, Dart Drug Corporation, Southeast (a District of Columbia Corporation) was organized March 1, 1960 and has continuously since August 15, 1960 operated a retail drug store at 4009 South Capitol Street, Washington, D.C.

(12) Plaintiff number 12, Dart Drug Corporation, Wheaton (a Maryland Corporation) was organized March 4, 1960 and has continuously since that time operated a retail drug store at 11181 Viers Mill Road, Wheaton Maryland.

(13) Plaintiff number 13, Coral Place Drugs, Inc. (a Maryland Corporation) was organized March 14, 1960 and has continuously since August 3, 1960 operated a retail drug store at 14 Coral Place, North Lexington Park, Maryland.

(14) Plaintiff number 14, Dart Drug Corporation, Eye Street (a District of Columbia Corporation) was organized March 15, 1960 and has continuously since September 17, 1960 operated a retail drug store at 18th and I Streets, N.W., Washington, D.C.

(15) Plaintiff number 15, Dart Drug Corp. G Street (a District of Columbia Corporation) was organized June 8, 1960 and has continuously since October 20, 1960 operated a retail drug store at 1111 G Street, N.W., Washington, D.C.

4. The plaintiff corporations collectively are hereinafter sometimes referred to as Dart and hereinafter individually referred to as Dart 1, etc. as the case may be according to the number assigned to each as plaintiff.

Dart now operates a total of thirteen (13) retail drug stores; eight (8) of these drug stores are in the District of Columbia; four (4) of these drug stores are in Maryland; and one (1) drug store is in Virginia.

5. Dart 1 is known as the parent company and does the purchasing for some of the thirteen drug stores and pays all the bills for all thirteen drug stores.

6. During the period beginning April 6, 1954 and extending to December 12, 1957, except for a six week period during July and August, 1956, Dart was a direct purchasing customer of Parke, Davis & Company. During that period direct purchases were made by Dart 2 under its former corporate name, Dart Drug Corporation; and during that period Dart operated stores at the locations hereinabove designated for Dart 2, 3 and 4. On December 12, 1957 as a result of the unlawful combination and conspiracy hereinafter alleged, Parke, Davis & Company advised Dart that it would no longer sell to it as a direct account. Theretofore in its customer relationship with Parke, Davis & Company, Dart had been able to obtain advantageous prices by being able to purchase its products directly from Parke, Davis & Company rather than through wholesalers. Since December 12, 1957 Dart has been forced to purchase Parke, Davis & Company products from wholesalers alone at a considerably higher cost than it was previously able to purchase them direct from Parke, Davis & Company.

As a further result of the unlawful combination and conspiracy hereinafter alleged, Parke, Davis & Company in February of 1961

initiated a new method of distribution under the terms of which it sells its large package sized goods only to direct accounts. Retailers, including Dart, who can only purchase from wholesalers are now unable to obtain large packaged sized Parke, Davis & Company goods and must purchase only the limited package sizes available through the wholesalers at a considerably higher cost than they would have to pay if they could purchase direct from Parke, Davis & Company.

B. The Defendant

Parke, Davis & Company (hereinafter sometimes referred to as Parke, Davis), is a corporation organized and existing under the laws of the State of Michigan with its principal place of business at Detroit, Michigan. Parke, Davis manufactures a complete line of drug products and sells and distributes the same throughout the United States and in the Washington, D.C. area through (a) branch offices of Parke, Davis; and (b) independent wholesalers doing business in the Washington, D.C. area and throughout the United States.

Whenever in this complaint it is alleged that the defendant did or performed any act, deed or thing, such allegation shall be deemed to mean that such act, deed or thing was authorized, ordered, done, approved or ratified by an officer, director, employee or agent thereof, for or on behalf of the defendant while actively engaged in the management, direction and control of its affairs.

Co-Conspirators

Two drug wholesaling corporations, not named defendants herein, participated as co-conspirators with Parke, Davis in the offenses hereinafter charged through their officers, agents and employees who performed acts and made statements in furtherance of said offense. These co-conspirators are sometimes hereinafter referred to as wholesaler co-conspirators and are engaged in the business of wholesaling pharmaceutical products, including Parke, Davis products, in the District of Columbia. They are: (a) District Wholesale Drug Corporation, Washington, D.C. and (b) The Henry B. Gilpin Company, Inc., Washington, D.C.

Various other persons, firms and corporations not named defendants herein have also participated as co-conspirators with Parke, Davis and the wholesaler co-conspirators in the offense hereinafter charged and have performed acts and made statements in furtherance thereof. These co-conspirators are sometimes hereinafter referred to as retailer co-conspirators and include various retail druggists conducting business as retail druggists in the District of Columbia. They include: McReynolds Pharmacy, Inc., Washington, D.C.; State Drugs Inc., Washington, D.C.; the Drug Mart Group, Washington, D.C. and Peoples Drug Stores, Washington, D.C.

Definitions

The following terms whenever used in this complaint have the meaning hereinafter defined:

(a) "Pharmaceutical products" means prescription and non-prescription drugs and medicines, and includes vitamins.

(b) "Wholesaler" means a person, firm, or corporation purchasing pharmaceutical products for resale to retailers thereof.

(c) "Retailer" means a person, firm, or corporation purchasing pharmaceutical products for resale to ultimate consumers.

Nature of Trade and Commerce

Parke, Davis is one of the country's principal manufacturers and distributors of pharmaceutical products. Parke, Davis has its principal plant for the manufacture of pharmaceutical products in the State of Michigan. It sells and distributes in interstate commerce from said principal plant large quantities of its products to wholesalers and retailers in the District of Columbia, Maryland and Virginia.

Parke, Davis has organized branch offices in various sections of the United States through which it sells and distributes its products to wholesalers and retailers. The Baltimore branch office, under the supervision of the home office in Detroit, sells and distributes the products of Parke, Davis to wholesalers and retailers in the District of Columbia, Maryland and Virginia.

There are two channels utilized by Parke, Davis to accomplish the sale and distribution of its products to the ultimate consumers in the District of Columbia, Maryland and Virginia. One channel leads from Parke, Davis, through wholesalers, to retailers and thence to consumers. When this channel is used the wholesaler places orders for and receives shipments of Parke, Davis products from the Baltimore branch office of Parke, Davis or directly from its principal plant in Michigan.

The other channel leads from Parke, Davis directly to retailers, and thence to ultimate consumers. When this channel is used the retailer places orders for and receives shipments of Parke, Davis products direct from the Parke, Davis Baltimore branch office, or directly from its principal plant in Michigan. When a retailer is able to purchase directly from Parke, Davis it effects a considerable savings in money since Parke, Davis competes with its wholesalers and gives a better price to direct purchasing retailers than such retailers can obtain if they are forced to buy Parke, Davis products only from wholesalers.

Background of the Offense

On May 2, 1957 a complaint was filed in this Court entitled United States of America, Plaintiff v. Parke, Davis & Company, Defendant, Civil Action No. 1064-57, charging Parke, Davis with conspiring with certain wholesaler and retailer customers to restrain trade in interstate commerce and in commerce within the District of Columbia in the sale and distribution of its drug products in violation of Sections 1 and 3 of the Sherman Act.

Civil Action No. 1064-57 was tried during June of 1958 and at the conclusion of the Government's evidence this Court found that Parke, Davis had not violated the Sherman Act. The Government appealed the decision to the Supreme Court and that Court on February 29, 1960 reversed and remanded the case to this Court with instructions to enter an appropriate judgment for the plaintiff unless Parke, Davis elected to submit evidence to refute the Government's right to relief established by the record in the case.

A further trial was had in June of 1960 at which time Parke, Davis put on its defense and again this Court found for Parke, Davis and denied the Government any injunctive relief. Once again the Government appealed to the Supreme Court and on September 14, 1960 that Court vacated this Court's order and remanded the case with directions to enter a judgment on the merits in favor of the Government. Such judgment was entered on April 19, 1961. A copy of this judgment is annexed to this complaint and is marked Exhibit A.

Offense Alleged

Commencing sometime in 1956, the exact date to the plaintiffs being unknown, and continuing up to and including the date on which this complaint was filed, Parke, Davis has entered into and maintained a combination and conspiracy in restraint of interstate trade and commerce and trade and commerce within the District of Columbia in its products in violation of Sections 1 and 3 of the Sherman Act.

The restraint of trade in violation of Sections 1 and 3 of the Sherman Act as alleged in the above paragraph hereof has consisted of a series of acts, a plan of action and an understanding and concert of Action among Parke, Davis and certain wholesaler and retailer customers of Parke, Davis in the District of Columbia, the substantial terms of which are:

(a) That on sales of pharmaceutical products manufactured by Parke, Davis, the wholesaler co-conspirators and retailer co-conspirators will adhere to resale prices fixed by Parke, Davis;

(b) That the defendant and the wholesaler co-conspirators will refuse to sell pharmaceutical products manufactured by Parke, Davis to retailers who do not agree to adhere to resale prices fixed by Parke, Davis;

(c) That the retailer co-conspirators will not advertise pharmaceutical products manufactured by Parke, Davis at prices lower than the resale prices fixed by Parke, Davis;

(d) That the defendant and the wholesaler co-conspirators will refuse to sell pharmaceutical products manufactured by Parke, Davis to retailers who advertise such products at prices lower than the resale prices fixed by Parke, Davis; and

(e) That the defendant will induce, coerce and compel wholesalers not to sell pharmaceutical products manufactured by Parke, Davis to retailers who sell or advertise such products at lower prices than the resale prices fixed by Parke, Davis.

Effects of the Violation of Law

As a result of the aforesaid combination and conspiracy in restraint of trade:

(a) Plaintiffs are not able to obtain Parke, Davis products directly from that company;

(b) Plaintiffs have had to pay considerably higher prices because they can only purchase Parke, Davis products through wholesalers;

(c) Plaintiffs are unable to obtain the required volume of Parke, Davis products necessary to their business operations;

(d) Plaintiffs have been prevented from filling prescriptions for pharmaceutical products manufactured by Parke, Davis;

(e) Plaintiffs have been prevented from conducting their businesses freely as independent businesses; and

(f) Plaintiffs have been deprived of earnings.

PRAYER

WHEREFORE, Plaintiffs pray:

(a) That since the aforesaid combination and conspiracy to restrain trade, has been declared and adjudged by this Court to be illegal and in violation of Sections 1 and 3 of the Sherman Act, that judgment be rendered in favor of the plaintiffs for the damage caused them by the violation of the antitrust laws in the sum of One Hundred Twenty Six Thousand, Eight Hundred and Ninety Dollars ($126.890) and that, in accordance with the law, this amount be trebled.

(b) That the Court allow and defendant be required to pay the full cost of this suit, including as part thereof a reasonable fee for the services of plaintiffs' attorneys.

Frederick T.M. Crowley
* * *

DEMAND FOR JURY

Please take notice that Plaintiff demands trial by jury in this action.

Frederick T.M. Crowley
* * *

[Filed February 5, 1962]

ANSWER OF DEFENDANT, PARKE, DAVIS & COMPANY

The defendant, Parke, Davis & Company (hereinafter referred to as "Parke, Davis"), by its undersigned attorneys, answers the complaint herein as follows:

First Defense

1. Parke, Davis admits that the complaint is filed and the jurisdiction of this Court is invoked under Section 4 of the Clayton Act but denies each and every other allegation of Paragraph 1 of the complaint.

2. Parke, Davis admits the allegations of Paragraph 2 of the complaint.

3. Parke, Davis admits that a firm known to Parke, Davis as Dart Drug Corporation (hereinafter referred to as "Dart") has from time to time been engaged in the retail drugstore business at a location or locations in the area of Washington, D.C., but Parke, Davis is

without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 3 of the complaint.

4. Parke, Davis is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 4 of the complaint.

5. Parke, Davis is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 5 of the complaint.

6. Parke, Davis admits that from time to time in the period April 6, 1954, to December 12, 1957, Dart made purchases from Parke, Davis, that on December 12, 1957, Parke, Davis advised Dart that it would no longer sell its products to Dart, that since that date Parke, Davis has not sold its products to Dart, and that in February of 1961 Parke, Davis discontinued its previous practice of offering to sell, and selling,certain bulk packages of its products to wholesalers, but Parke, Davis denies that the actions which it took on December 12, 1957, and in February, 1961, were a result of an unlawful combination and conspiracy, and Parke, Davis is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 6 of the complaint.

7. With respect to that portion of the complaint which follows the heading "B. The Defendant", Parke, Davis admits that it is a corporation organized and existing under the laws of the State of Michigan with its principal place of business at Detroit, Michigan, and that it manufactures drug products and sells and distributes the same in various parts of the United States and in the Washington, D.C., area through branch offices of Parke, Davis and independent wholesalers doing business in the Washington, D.C., area and in various parts of the United States. Parke, Davis is not required to plead responsively to any of the other allegations of the aforesaid portion of the complaint.

8. With respect to that portion of the complaint which follows the heading "Co-Conspirators", Parke, Davis admits that firms known to Parke, Davis as District Wholesale Drug Corporation and The Henry B. Gilpin Co., Inc., are engaged in the business of wholesaling pharmaceutical products, including Parke, Davis products, in the District of Columbia, and that firms known to Parke, Davis as McReynolds Pharmacy, Inc., State Drugs, Inc., and Peoples Drug Stores are conducting business as retail druggists in the District of Columbia, but Parke, Davis denies each and every other allegation of the aforesaid portion of the complaint.

9. With respect to the first paragraph which appears in the complaint following the heading "Nature of Trade and Commerce", Parke, Davis admits the allegations of such paragraph.

10. With respect to the second paragraph which appears in the complaint following the heading "Nature of Trade and Commerce", Parke, Davis admits the allegations of said paragraph except that it denies that all activities of the Baltimore branch office in the sale and distribution of Parke, Davis products are under the supervision of the home office in Detroit.

11. With respect to the third paragraph which appears in the complaint following the heading "Nature of Trade and Commerce", Parke, Davis admits and avers that wholesalers place orders for and receive shipments of its products from the Baltimore branch office of Parke, Davis or occasionally, in emergency situations, directly from the company's plant in Michigan, but Parke, Davis denies each and every other allegation of said paragraph.

12. With respect to the fourth paragraph which appears in the complaint following the heading "Nature of Trade and Commerce", Parke, Davis admits that retailers place orders for and receive shipments of its products direct from the Baltimore branch office of Parke, Davis or from its principal plant in Michigan, but Parke, Davis is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of said paragraph.

13. With respect to that portion of the complaint which follows the heading "Background of the Offense", Parke, Davis admits the allegations set forth therein except that it denies that the Supreme Court of the United States vacated an order of this Court on September 14, 1960, and avers that said order was vacated on January 23, 1961.

14. With respect to that portion of the complaint which follows the heading "Offense Alleged", Parke, Davis denies each and every allegation therein.

15. With respect to that portion of the complaint which follows the heading "Effects of the Violation of Law", Parke, Davis admits that Dart is not able to obtain Parke, Davis products directly from Parke, Davis, but Parke, Davis denies that this disability or any other disability or any injury to any party has resulted or is resulting from any unlawful combination or conspiracy on the part of Parke, Davis, and Parke, Davis is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of the aforesaid portion of the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

Insofar as the complaint states a claim or claims which accrued prior to January 16, 1958, such claims are barred by the provisions of Section 4B of the Clayton Act, 69 Stat. 283 (1955), 15 U.S.C.A. § 15b (Supp. 1960).

WHEREFORE, Parke, Davis denies that the plaintiff is entitled to the relief prayed for in the complaint, or any part thereof, or to any

other relief against Parke, Davis, and prays for judgment dismissing the complaint herein with the costs and disbursement of this action.

GERHARD A. GESELL
ROBERTS B. OWEN
* * *

Attorneys for Defendant
Parke, Davis & Company

By: /s/ Gerhard A. Gesell

EXHIBIT A

[Filed April 19, 1961]

FINAL JUDGMENT

The plaintiff, United States of America, having filed its complaint herein on May 2, 1957, the defendant, Parke, Davis & Company, having appeared and filed its answer to such complaint, the issues having been tried from June 11 through June 13, 1958, final argument having been had on June 17, 1958, the Court having entered its Findings of Fact and Conclusions of Law together with its opinion on July 16, 1958 finding that Parke, Davis & Company had not violated the Sherman Act, Notice of Appeal having been filed by the plaintiff on September 11, 1958, probable jurisdiction having been noted by the Supreme Court on February 24, 1959 and the Supreme Court having reversed and remanded the case to this Court on February 29, 1960, with instructions to enter an appropriate judgment for the plaintiff unless the defendant elected to submit evidence in defense to refute the Government's right to relief established by the record, further trial having been had on June 6, 1960, the Court having entered Supplementary Findings of Fact and Conclusions of Law on July 18, 1960 denying injunctive relief to the plaintiff and denying any finding of liability in the defendant, further appeal having been noted by the plaintiff to the Supreme Court on September 14, 1960, and the Supreme Court having vacated this Court's order and remanded the case with direction to enter a judgment on the merits in favor of the Government, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I

The Court has jursidction of the subject matter hereof and the parties herein. The defendant, Parke, Davis & Company, in 1956 combined and conspired with its wholesalers and others in the District of Columbia and Richmond, Virginia to unreasonably restrain commerce in pharmaceutical products in violation of Sections 1 and 3 of the Act of Congress of July 2, 1890 entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, as amended.

II

For a short time prior to the summer of 1956, there had been price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell to these retailers until deep price cutting by retailer Dart Drug Company caused the Baltimore branch manager to inquire as to a possible remedy at a branch manager's meeting in Detroit. At that meeting he learned that the company took the position that in a non-fair trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of Parke, Davis. The manager of the Baltimore branch office returned after this meeting and instructed his assistants and the company salesmen to inform the trade in the District of Columbia and Virginia that Parke, Davis would not sell to any retailer who sold its products below suggested minimum prices, and would not sell to any wholesaler who, in turn, sold those products to such a retailer. Parke, Davis sought to enter into agreements with the wholesalers and retailers to maintain its suggested resale prices and instructed and authorized its representatives to seek such agreements. These instructions were carried out in July 1956.

III

Parke, Davis brought to the attention of each of the wholesalers named as co-conspirators in the complaint the names of the retailers which were selling its products at prices below the recommended retail

prices. At the same time it informed each of the wholesalers that its competitors were being contacted for the same purpose. Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves, although occasionally such products were sold by inadvertence to those retailers. Parke, Davis solicited agreements and the wholesalers made agreements with Parke, Davis on this subject.

IV

In the latter part of August 1956, Parke, Davis representatives advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis products in the newspapers or on their windows. Dart Drug agreed to stop this advertising and other retailers upon being informed of Dart's action also agreed to cease this advertising. Parke, Davis then resumed selling its products to each of these retailers and for a period of one month there were no newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices. Parke, Davis solicited and obtained agreements with Dart Drug and other retailers regarding advertising.

V

During the period when Dart Drug had been cut off by Parke, Davis it complained that the Peoples Drug Store across the street from it was advertising cut prices on Parke, Davis products in its window. The assistant branch manager of the Baltimore branch office of Parke, Davis advised a Vice President of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis suggested prices. The Parke, Davis representative solicited Peoples support of the Parke, Davis pricing policies. The Peoples representative agreed to abide by the Parke, Davis products and stopped cutting prices on these products. Parke, Davis solicited an agreement with Peoples and Peoples entered into an agreement or understanding with Parke, Davis concerning prices and advertising.

VI

Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy. Sometime later in July, and again in the latter part of August, Parke, Davis representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell to it. Dart Drug agreed to stop its cut price advertising and Parke,Davis continued to sell to Dart Drug until December 12, 1957 when it advised that concern that it would no longer sell to it on a direct basis. Dart is still able to obtain Parke, Davis supplies from its wholesalers but at a higher cost than when it was able to buy direct from Parke, Davis.

VII

This Court will retain the case on its docket for future action in the event the Government applies for further relief from an alleged resumption by Parke, Davis of illegal activity.

Entered this 19th day of April 1961.

/s/ Joseph R. Jackson
United States District Judge

[Filed April 27, 1962]

INTERROGATORIES PROPOUNDED TO PLAINTIFF
DART DRUG CORPORATION, CONN. & "K",
BY DEFENDANT PARKE, DAVIS & COMPANY

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant Parke, Davis & Company hereby requests that plaintiff Dart Drug Corporation, Conn. & "K", answer each of the following interrogatories under oath.

Preliminary Statement

The following definitions and principles are to be observed in interpreting and answering these interrogatories:

(1) The term "firm" as used herein includes an association, partnership, corporation or any other business entity.

(2) The term "agency" shall include agencies of the United States Government.

(3) Whenever an interrogatory asks that you "identify" an "individual", state the individual's name, his last known address, the firm or agency for which the individual was working or acting in the period indicated by the context of the interrogatory, and his position with such firm or agency.

(4) The term "document" means a paper of every kind, including but not limited to a letter, memorandum, telegram, written instrument, record, book, note, recording, report, or diary entry.

(5) Whenever an interrogatory asks that you "identify" a "document", state the name of the author of the document, the name or title of the addressee or the names or titles of the addressees of the document, the title of the document itself, the date of the document, and any other characteristics of the document as may be necessary in order to identify it, or, if more convenient, attach a copy of the document to your answer to the interrogatory involved.

(6) Whenever an interrogatory asks that you identify or state a date and the exact date is not known to you, specify as narrowly as possible the period of time within which you claim or believe that the occurrence involved took place.

Interrogatories

I. With respect to the allegation of the complaint (at p. 5) that on December 12, 1957, Parke, Davis & Company "advised Dart that it would no longer sell to it as a direct account" (which action on the part of Parke, Davis will be referred to hereinafter as "the 1957 cutoff") and that the 1957 cutoff "was a result of the unlawful combination and conspiracy hereinafter alleged",

A. State whether or not you claim that the 1957 cutoff was unlawful;

B. If your answer to Interrogatory I-A above is "yes", state whether or not you claim that the 1957 cutoff was unlawful because Parke, Davis on or before December 12, 1957, had entered into an unlawful agreement, express or implied, to undertake the 1957 cutoff;

C. If your answer to Interrogatory I-B above is "yes", identify

(1) The date upon which you claim such agreement was made;

(2) Each firm which you claim was a party to such agreement;

(3) Each individual who you claim acted for each firm identified in your answer to Interrogatory I-C(2) above;

(4) Each individual who, acting in his own behalf, you claim was a party to such agreement;

(5) Each individual, not previously identified in your answer to this Interrogatory I-C, who has knowledge of either the making or the carrying out of such agreement;

(6) Each document the contents of which, to your knowledge, may in any way relate to the existence, nonexistence, character, terms, parties, duration or circumstances of such agreement.

II. With respect to the allegations of the complaint (at p. 6) that "Parke, Davis & Company in February of 1961, initiated a new method of distribution under the terms of which it sells its large package sized goods only to direct accounts" (which action on the part of Parke, Davis will be referred to hereinafter as "the 1961 distribution change"), and that the 1961 distribution change was a "result of the unlawful combination and conspiracy" alleged in the complaint,

A. State whether or not you claim that the 1961 distribution change was unlawful;

B. If your answer to Interrogatory II-A above is "yes", state whether you claim that the 1961 distribution change was unlawful because Parke, Davis, on or before the date of the 1961 distribution change, had entered into an unlawful agreement, express or implied, to make the 1961 distribution change;

C. If your answer to Interrogatory II-B above is "yes", identify

(1) The date upon which you claim such agreement was made;

(2) Each firm which you claim was a party to such agreement;

(3) Each individual who you claim acted for each firm identified in your answer to Interrogatory II-C(2) above;

(4) Each individual who, acting in his own behalf, you claim was a party to such agreement;

(5) Each individual, not previously identified in your answer to this Interrogatory II-C, who has knowledge of either the making or the carrying out of such agreement;

(6) Each document the contents of which, to your knowledge, may in any way relate to the existence, nonexistence, character, terms, parties, duration or circumstances of such agreement.

III. With respect to the allegations (at pages 9-10 of the complaint) that Parke, Davis has entered into and maintained a combination and conspiracy, two substantial terms of which are (a) "That the defendant and the wholesaler co-conspirators will refuse to sell pharmaceutical products manufactured by Parke, Davis to retailers who do not agree to adhere to resale prices fixed by Parke, Davis", and (b) "That the defendant and the wholesaler co-conspirators will refuse to sell pharmaceutical products manufactured by Parke, Davis to retailers who advertised such products at prices lower than the resale prices fixed by Parke, Davis",

A. State whether or not you claim that since December 31, 1956, the defendant or any wholesaler has refused to sell pharmaceutical products manufactured by Parke, Davis to a retailer (other than one of the plaintiff corporations) because the retailer either would not agree to adhere

to resale prices fixed by Parke, Davis or advertised Parke, Davis products at prices lower than the resale prices fixed by Parke, Davis;

B. If your answer to Interrogatory III-A is "yes", give the following information with respect to each such refusal to sell:

(1) State the date upon which you claim that either the defendant or the wholesaler made known its refusal to the retailer;

(2) Identify the retailer to whom you claim the refusal was addressed;

(3) Identify the potential seller who you claim refused to sell (i.e., Parke, Davis or a particular wholesaler to be identified in your answer);

(4) Identify each individual who has knowledge of such refusal;

(5) Identify each document the contents of which, to your knowledge, may in any way relate to the occurrence, nonoccurrence, character, terms, parties, duration or circumstances of such refusal.

IV. With respect to the allegation (at pp. 9-10 of the complaint) that Parke, Davis has entered into and maintained a combination and conspiracy, a substantial term of which is "That the defendant will induce, coerce and compell wholesalers not to sell pharmaceutical products manufactured by Parke, Davis to retailers who sell or advertise such products at lower prices than the resale prices fixed by Parke, Davis",

A. State whether or not you claim that since December 31, 1956, the defendant has performed any act or been a party to any communication, which act or communication was intended by the defendant to induce, coerce or compel any wholesaler not to sell pharmaceutical products manufactured by Parke, Davis to any retailer selling or advertising such products at lower prices than the resale prices fixed by Parke, Davis;

B. If your answer to Interrogatory IV-A above is "yes", give the following information as to each such event (whether act or communication) (giving such information separately as to each such event):

(1) State the date of such event;

(2) Describe such event in detail;

(3) Identify each individual who participated in such event;

(4) Identify each individual, not previously identified in your answers with respect to such event, who has knowledge of such event;

(5) Identify each document the contents of which, to your knowledge, may in any way relate to the occurrence, nonoccurrence, character, terms, parties, duration or circumstances of such event.

V. With respect to the allegations of the complaint (at pp. 9 and 10) that "Commencing sometime in 1956 . . . and continuing up to and including the date on which this complaint was filed, Parke, Davis has entered into and maintained a combination and conspiracy in restraint of" trade and that such restraint "has consisted of a series of acts, a plan of action and an understanding and concert of action among Parke, Davis and certain wholesaler and retailer customers of Parke, Davis",

A. State whether or not you claim that, between December 31, 1956, and the date of the filing of the complaint -- in addition to the conduct, if any, described in your answers to Interrogatories I through IV above -- Parke, Davis has performed any act or been a party to any communication, which act or communication was undertaken pursuant to or in furtherance of the alleged combination and conspiracy;

B. If your answer to Interrogatory V-A above is "yes", give the following information as to each such event (whether act or communication) (giving such information separately as to each such event):

(1) State the date upon which you claim such event occurred;

(2) Describe such event in detail;

(3) Identify each individual who you claim participated in such event;

(4) Identify each individual, not previously identified in your answers with respect to such event, who has knowledge of such event;

(5) Identify each document the contents of which, to your knowledge, may in any way relate to the occurrence, nonoccurrence, character, terms, parties, duration or circumstances of such event.

VI. With respect to the allegation of the complaint (at p. 7) that certain named wholesaler coconspirators, through their officers, agents and employees, "performed acts and made statements in furtherance of" the offense alleged in the complaint, give the following information (unless previously given in your answers to Interrogatories I through V above) as to each such event (whether act or communication) which occurred between December 31, 1956, and the date of the filing of the complaint (giving the information separately as to each such event):

A. State the date of such event;

B. Describe such event in detail;

C. Identify each individual who participated in such event;

D. Identify each individual, not previously identified in your answers with respect to such event, who has knowledge of such event;

E. Identify each document the contents of which, to your knowledge, may in any way relate to the occurrence, nonoccurrence, character, terms, parties, duration or circumstances of such event.

VII. With respect to the allegation of the complaint (at p. 7) that certain named retailer coconspirators "have performed acts and made statements in furtherance" of the offense charged in the complaint, give the following information (unless previously given in your answers to Interrogatories I through VI above) as to each such event (whether act or communication) which occurred between December 31, 1956, and the date of the filing of the complaint (giving such information separately as to each such event):

A. State the date of such event;

B. Describe such event in detail;

C. Identify each individual who participated in such event;

D. Identify each individual, not previously identified in your answers with respect to such event, who has knowledge of such event;

E. Identify each document the contents of which, to your knowledge, may in any way relate to the occurrence, nonoccurrence, character, terms, parties, duration or circumstances of such event.

VIII. A. With respect to the allegation of the complaint (at p. 11) that plaintiffs have been "unable to obtain the required volume of Parke, Davis products necessary to their business operations", state whether or not you claim that unlawful conduct of the defendant caused you injury by preventing you from making purchase (of Parke, Davis products) which you would have made in the absence of the unlawful conduct;

B. If your answer to Interrogatory VIII-A above is "yes", give the following information as to each calendar quarter (prior to the filing of the complaint) in which you claim that, in the absence of the alleged unlawful conduct, you would have purchased greater quantities of Parke, Davis products than you did in fact (giving such information separately as to each such calendar quarter):

(1) Identify each Parke, Davis product which you claim you would have purchased in greater quantities in such quarter in the absence of the alleged unlawful conduct;

(2) Give the following information as to each product identified in your answer to Interrogatory VIII-B(1) (giving such information separately for each such product):

(a) State the quantity of such product which you claim that, in the absence of the alleged unlawful conduct, you would have purchased but did not in fact purchase in such quarter;

(b) State the price at which you claim you would have purchased such quantity of such product in such quarter;

(c) State the price at which you claim you would have resold such quantity of such product;

(d) State the total amount of the expenses which you would have charged under your ordinary accounting principles to your sales of such quantity of such product;

(e) State the profit which you claim you would have earned from such sales;

(f) State the dollar amount of the damage, if any, which you claim you sustained as a result of your alleged inability to purchase such product in such quantity in such quarter;

(g) Identify each individual who participated in the preparation of your answer to this Interrogatory VIII-B(2) with respect to such product;

(h) Identify each document used in the preparation of your answer to this Interrogatory VIII-B(2) with respect to such product.

IX. A. With respect to the allegation of the complaint (at p. 11) that "Plaintiffs have had to pay considerably higher prices because they can only purchase Parke, Davis products through wholesalers", state whether or not you claim that the alleged unlawful conduct of the defendant caused you injury by causing you to pay higher prices for Parke, Davis products which you actually purchased than you would have paid in such transactions in the absence of the alleged unlawful conduct;

B. If your answer to Interrogatory IX-A above is "yes", give the following information as to each purchase of a Parke, Davis product which you made between the date upon which you claim that the defendant first engaged in such unlawful conduct and the date of the filing of the complaint (giving such information separately for each such purchase):

(1) State the date of such purchase;

(2) Identify each individual who acted in your behalf in the transaction;

(3) Identify the firm or individual from whom the purchase was made;

(4) Identify each individual who acted in behalf of the seller in the transaction;

(5) Identify each Parke, Davis & Company product included in such purchase;

(6) As to each product identified in your answer to Interrogatory IX-B(5) above with respect to such purchase, state separately for each such product:

(a) The number of units of such product included in such purchase;

(b) The unit price paid;

(c) The fee or commission, if any, paid by you to an independent agent or broker for services rendered in connection with such purchase of such product;

(d) The unit price at which you claim that you would have purchased such product if such purchase had been made from Parke, Davis & Company;

(e) The amount of damage, if any, which you claim you sustained in such purchase of such product;

(f) The unit price at which you resold such product;

(g) The unit price at which you claim that you would have resold such product if such purchase had been made from Parke, Davis & Company;

(7) Identify each act of the defendant (e.g., the 1957 cutoff, the 1961 distribution change) which you claim was a proximate cause of such damage as you sustained in such purchase;

(8) Identify each document the contents of which, to your knowledge, may in any way relate to the occurrence, nonoccurrence, character, terms, parties, duration or circumstances of such purchase;

(9) Identify each document, not previously identified in your answers with respect to such purchase, used in the preparation of your answers with respect to such purchase;

(10) Identify each individual who participated in the preparation of your answers with respect to such purchase;

(11) Identify each individual, not previously identified in your answers with respect to such purchase, who has knowledge of such purchase.

X. A. If your answer to either Interrogatory VIII-A or Interrogatory IX-A is "yes", state whether or not, between the date upon which you claim that the defendant first engaged in such unlawful conduct and the date of the filing of the complaint, you made any effort to purchase any

Parke, Davis product by contacting any firm or individual other than Parke, Davis (such firm or individual being referred to hereinafter as a "potential seller"), which effort was unsuccessful either because the potential seller did not have such product or products available in the desired quantity or because such potential seller was unwilling to sell at a price acceptable to you;

B. If your answer to Interrogatory X-A above is "yes", give the following information as to each potential seller whom you contacted in the course of such an unsuccessful effort (giving such information separately as to each such potential seller):

(1) Identify the potential seller;

(2) Identify each date upon which you contacted such potential seller in such an unsuccessful effort;

(3) Give the following information as to each date identified in your answer to Interrogatory X-B(2) with respect to such potential seller (giving such information separately as to each such date):

(a) Identify each individual who acted in your behalf in contacting such potential seller on such date;

(b) Identify each individual who acted on behalf of such potential seller in such contact on such date;

(c) Identify each Parke, Davis product which was the subject of such contact on such date;

(d) Give the following information as to each product identified in your answer to Interrogatory X-B(3) (c) with respect to such date (giving such information separately for each such product):

(i) State the quantity of such product which you sought to purchase from such potential seller on such date;

(ii) State the price, if any, quoted by such potential seller for such product on such date;

(e) Identify each individual, not previously identified in your answers with respect to such date, who has knowledge of such contact with such potential seller on such date;

(f) Identify each document the contents of which, to your knowledge, may in any way relate to the existence, nonexistance, character, terms, parties, duration or circumstances of such contact with such potential seller on such date.

XI. If you claim any damages the basis of which has not been fully set forth in answer to previous interrogatories, give the following information with respect to each allegedly wrongful act of the defendant which gave rise to such damage:

A. State the date upon which such act was performed;

B. Describe such act in detail;

C. Identify each individual who participated in such act;

D. Identify each individual, not previously identified in your answer with respect to such act, who has knowledge of such act;

E. Identify each document the contents of which, to your knowledge, may in any way relate to the occurrence, nonoccurrence, character, terms, parties, duration or circumstances of such act;

F. State the dollar amount of the damage which you claim you sustained as a result of such act;

G. Describe the method which you used in computing such dollar amount;

H. Identify each document, not previously identified in your answer with respect to such act, used in the preparation of your answer with respect to such act;

I. Identify each individual who participated in the preparation of your answer with respect to such act.

XII. With respect to the complaint's prayer that "judgment be rendered in favor of the plaintiffs for the damage caused them . . . in the sum of One Hundred Twenty Six Thousand, Eight Hundred and Ninety Dollars ($126,890)",

A. State the portion of the total damages of $126,890 which you claim was sustained by you as an individual plaintiff (which portion will be referred to hereinafter as "your share of the damages");

B. State the date upon which your share of the damages was computed;

C. Identify the individual who computed your share of the damages;

D. Identify each individual who participated in the computation of your share of the damages;

E. Describe in detail how your share of the damages was computed;

F. If the computation of your share of the damages was in writing, identify each document setting forth such computation;

G. Identify each document, not previously identified in your answers to this Interrogatory XII, used in the computation of your share of the damages;

H. Give the following information as to each calendar year within which you claim that you sustained a portion of your share of the damages (giving such information separately for each such calendar year):

(1) State the portion of your share of the damages which you claim that you sustained in such calendar year (which portion will be referred to hereinafter as "your damages for the year");

(2) State the date upon which your damages for the year were computed;

(3) Identify the individual who computed your damages for the year;

(4) Identify each individual who participated in the computation of your damages for the year;

(5) Describe in detail how your damages for the year were computed;

(6) If the computation of your damages for the year was in writing, identify each document setting forth such computation;

(7) Identify each document, not previously identified in your answers with respect to such calendar year, used in the computation of your damages for the year.

/s/ Gerhard A. Gesell
/s/ Roberts B. Owen
* * *
Attorneys for Parke, Davis & Company

[Filed June 28, 1962]

ANSWERS TO INTERROGATORIES PROPOUNDED BY THE DEFENDANT TO THE PLAINTIFFS

Preliminary Statement

A separate set of identical interrogatories was propounded to each of the several plaintiffs. However, with minor exceptions which are specified herein the answers are the same for all plaintiffs; therefore, the plaintiffs consider that they have answered completely and fully by combining all answers as to all plaintiffs in this one set of answers to the interrogatories.

I. A. Yes. An unlawful combination and conspiracy by Parke, Davis & Company against Dart Drug was found to have existed in Civil Action No. 1064 '57, United States of America, plaintiff v. Parke, Davis & Company, defendant. It is the plaintiff's contention herein that the 1957 cut off of Dart was a direct result of the combination and conspiracy found to be unlawful in Civil Action No. 1064 '57. If it had not been for that unlawful combination and conspiracy, Dart would not have been cut off. There was a criminal anti-trust suit against Parke, Davis, United States of America v. Parke, Davis & Company, CR. No. 444-57, which resulted in an acquittal of Parke, Davis on November 5, 1957. Herbert H. Haft, President of Dart, testified for the U. S. against Parke, Davis in that case. After the defendant had won the criminal case Dart was cut off, which plaintiffs assert was a direct result of testimony given by Mr. Haft at the criminal trial.

I. B. See I. A.

I. C. See I. A.

II. A. Plaintiffs make no contention as to whether the 1961 distribution change was legal or illegal. The purpose of the allegation of this complaint concerning the 1961 distribution change runs to the issue of damages. Since the plaintiffs were unable to purchase direct by reason of the 1957 cut off, the 1961 distribution change resulted in their not being able to purchase the large package sized goods. Coupled with the 1957 cut off,

the 1961 distribution change has forced the plaintiffs to pay higher prices for Parke, Davis products and has also had the effect of keeping plaintiffs from obtaining sufficient of these products to meet the demands of their business.

II. B. See II. A.

II. C. See II. A.

III. A. Plaintiffs do not have any present knowledge as to whether since December 31, 1956 the defendant or any wholesaler has refused to sell pharmaceutical products manufactured by Parke, Davis to a retailer (other than one of the plaintiff corporations) because the retailer either would not agree to adhere to resale prices fixed by Parke, Davis or advertised Parke, Davis products at prices lower than the resale prices fixed by Parke, Davis. Plaintiffs do have knowledge of the fact that certain retailers (other than the plaintiff corporations) were cut off from purchasing Parke, Davis products from the defendant direct or from wholesalers prior to December 31, 1956. Plaintiffs further have knowledge of the fact that the unlawful combination and conspiracy was still in effect subsequent to December 31, 1956 although all acts in performance thereof were apparently discontinued during the months of September, October and November of 1956 (with one exception) subsequent to the defendant's discovery that the Department of Justice had initiated an investigation into its business practices in the District of Columbia and the Richmond, Virginia area. During August of 1956 the defendant and certain retail druggists entered into oral agreements to the effect that the defendant would resume selling its pharmaceutical products directly, and that the wholesaler co-conspirators would be permitted to sell to the plaintiff corporations and other retailers, upon the understanding that the then existing plaintiff corporations would discontinue advertising the defendant's pharmaceutical products at prices below the suggested resale price. Plaintiff corporations and other retailers had been cut off from direct purchases from the defendant as well as purchases from the wholesaler co-conspirators acting in concert with the defendant because they were

selling and advertising pharmaceutical products manufactured by the defendant at prices lower than the suggested resale prices. Plaintiff corporations claim that these alternate agreements were acceptable to the defendant in view of the Department of Justice's investigation. Subsequent to these agreements, plaintiff corporations resumed advertising defendant's products at prices lower than suggested resale prices upon learning that other retailers who had similarly entered into agreements with the defendant with respect to advertising, resumed advertising at lower prices. The defendant's hand was stayed until the termination of the criminal case. In December of 1957, after the conclusion of the criminal case which was won by the defendant, the then existing plaintiff corporations were notified by Parke, Davis that it would have no further business relations with plaintiffs. Plaintiffs contend that this refusal to deal relates back to the unlawful combination and conspiracy and was a direct effect of such combination and conspiracy.

III. B. See II. A.

IV. A. Plaintiffs do not have any present knowledge as to whether since December 31, 1956 the defendant has induced, coerced or compelled any wholesaler not to sell its pharmaceutical products to any retailer selling or advertising such products at lower prices than the resale prices fixed by Parke, Davis. Plaintiffs do have knowledge of the fact that there was an over-all combination and conspiracy directed by Parke, Davis to establish, maintain, enhance and fix retail prices of its pharmaceutical products. Under the terms of this combination and conspiracy Parke, Davis and the wholesaler co-conspirators agreed to boycott retailers who would refuse to adhere to these fixed prices or who would not agree to stop advertising at prices lower than those fixed by Parke, Davis. Plaintiffs have further knowledge that several wholesalers were coerced into refusing to sell Parke, Davis products to plaintiffs and other retailers prior to December 31, 1956. Plaintiffs assert that the unlawful combination and conspiracy of which the wholesalers were a part was still in effect subsequent to December 31, 1956 although all acts in performance thereof were apparently discontinued during the three months prior to

December 31, 1956 subsequent to the defendant's discovery that the Department of Justice had initiated an investigation into the defendant's business practices in the District of Columbia and the Richmond, Virginia area. Plaintiffs further assert that by reason of the 1957 cut off and the 1961 distribution change plaintiffs can now only obtain the Parke, Davis line through wholesalers at higher costs and plaintiffs are unable to obtain enough products to satisfy their needs.

IV. B. See IV. A.

V. A. Plaintiffs believe that this interrogatory is answered in answers I through IV above.

VI. Plaintiffs believe that this interrogatory is answered by answers I through IV above.

VII. Plaintiffs believe that this interrogatory is answered by answers I through IV above.

VIII. A. Yes. See answers to interrogatories I through IV above.

VIII. B. (1)

The following items are items which had been purchased from Parke, Parke, Davis & Company during the period January, 1956 to November, 1957 and are products which we could not obtain sufficient quantities of to meet the demand:

SG Cap 240 Abdol with Minerals - 100's

Kap 363 Combex - 100's

SG Cap 234 Myadec - 100's

Comfort Powder - 4 oz.

Comfort Powder - 10 oz.

HF Cap 470 Nutritive - 100

Paladac - Pint

Siblin - 1 lb.

Kap 382 Geriplex - 100

SG Cap 218 Abdol with Vitamin C - 100

Kap 367 Combex with Vitamin C - 100

Kap 371 Abdec - 100

Abdec Drops - 50cc

Cosanyl - 4 oz.

Medicated Throat Discs - 12's

Caladryl Lotion - 6 oz.

Caladryl Cream - Tube

Ziradryl Lotion - 6 oz.

Oint 71 Ziradryl Cream - 1 oz.

Kap 390 Natabec - 100

SG Cap 239 Abdol w/Minerals for Child - 100

Pill 974 Alophen - 100

Abdec Drops Flavored - 50cc

VIII. B. (2) (a)

The total value of all products is included in our computation of damages due. To give quantity of each item would entail untold hours of clerical work and would not be possible in time granted for filing of this deposition. If it is shown by the defendant that this is a material item, it is possible to submit such information in due course. Schedules 5 through 8 set forth the total dollar value of products which we were unable to obtain.

VIII. B. (2) (b)

The price paid by Dart Drug Corporation for merchandise which it did receive from service wholesalers was Parke, Davis & Company suggested retail prices less 33 1/3%. Had such additional purchases been available the purchases would have been at the same price.

VIII. B. (2) (c)

The selling price is dictated by prices being charged by other retailers in similar type of business and such prices change from time to time.

VIII. B. (2) (d)

None.

VIII. B. (2) (e)

See answer to VIII. B. (2) (c). Plaintiffs' claim is for additional cost of merchandise and the loss due to inability to obtain merchandise

in sufficient volume, plus an arbitrarily alleged loss of profit in the amount of $25,000.

VIII. B. (2) (f)

See answer to VIII. B. (2) (a). See Schedules 5-9, which set forth the total dollar damage resulting from the higher cost of Parke, Davis & Company merchandise that was obtained and also the damages on merchandise which would not be obtained.

VIII. B. (2) (g)

Charles D. Shipe, Vice President, Dart Drug Corporation.

VIII. B. (2) (h)

Sundry invoices of Parke, Davis & Company for period January, 1956 to November, 1957.

IX. A. Yes. Plaintiffs believe this interrogatory is answered by Answers I through IV. Because of the actions of Parke, Davis & Company it was necessary for Dart Drug to purchase what Parke, Davis & Company merchandise it could get from local wholesalers. The information requested by the defendant under this caption would have to be extracted from invoices from these local wholesalers. In addition to the Parke, Davis & Company merchandise purchases from these local wholesalers, merchandise of many hundred other manufacturers are also purchased. The current rate of purchases from these wholesalers exceeds $1,000,000.00 per year and involves in excess of 500,000 transactions per year. To supply the information requested by item IX. B. would require a minimum of six months time. We will be pleased to make available all pertinent records and point out repeated instances of purchase of Parke, Davis & Company merchandise from these wholesalers and that the price paid was Parke, Davis & Company suggested list price less 33 1/3%.

IX. B. (1)

See answer to IX. B.

IX. B. (2)

All employed by Dart Drug Corporation or one of plaintiffs.

Name	Address	Position
Herbert H. Haft	7012 W. Greenvale Pkwy. Chevy Chase, Md.	President
Herbert Kwash	908 Caddington Ave. Silver Spring, Md.	Manager
Edward Williams	307 Charlton Court Silver Spring, Md.	Manager
Jerry Berger	75 East Wayne St. Silver Spring, Md.	Ass't Mgr.
Paul Levy	7520 Maple Ave. Takoma Park, Md.	Manager
Carl Zeytoonian	12701 Weiss Street Rockville, Md.	Manager
Ted Wilensky	2442 Ross Road Silver Spring, Md.	Manager
Bernard Kennen	4714 Kenmore Ave. Alexandria, Va.	Ass't. Mgr.
Eli Bloom	712 Lewander Lane Silver Spring, Md.	Manager
Nicholas Lungonci	11613 Gilsan St. Silver Spring, Md.	Ass't. Mgr.
Arthur Salus	707 Lowander Lane Silver Spring, Md.	Manager
Morton Bachrach	1612 Sheldon Drive Alexandria, Va.	Ass't. Mgr.
Norman Rabinowitz	211 Hillsboro Drive Silver Spring, Md.	Manager
Sam Goldberg	1921 Rosemary Hills Dr. Silver Spring, Md.	Ass't. Mgr.
Irv Pichney	4220 S. Capitol St. Washington, D. C.	Manager
Stanton Rudo	5223 4th St. N. E. Washington, D. C.	Ass't. Mgr.
Marion S. Hamer	Box 101 Hughesville, Md.	Manager
Dave Vasper	Leonardtown, Md.	Ass't Mgr.

Name	Address	Position
Walter Rosenberg	1004 Playford Lane Silver Spring, Md.	Manager
Jack L. Menaker	1323 Kalmia Rd. N. W. Washington, D. C.	Ass't. Mgr.
Sidney Shein	1611 Park Road N. W. Washington, D. C.	Manager
Nathan Eidelman	9618 Lawndale Court Silver Spring, Md.	Vice Pres.

IX. B. (3)

Henry B. Gilpin Wholesale Drug Co.

District Wholesale Drug Co.

IX. B. (4)

The individuals acting on behalf of the wholesalers would be the telephone order takers. The names of all the order takers during the period January 1, 1958 through June 30, 1961, are not known to the plaintiff. However, the defendant can readily obtain this information from the payroll records of The Henry B. Gilpin Company, 901 Southern Avenue, Washington, D.C., and from District Wholesale Drug Corporation, 52 "O" Street, N.W., Washington, D. C.

IX. B. (5)

See answer to IX. B.

IX. B. (6) (a)

See answer to IX. B.

IX. B. (6) (b)

See answer to IX. B.

IX. B. (6) (c)

None.

IX. B. (6) (d)

See Answer to XII. H. (5) and Schedule 3. The computation of cost of 45.96% of Suggested Retail Price of Parke, Davis & Company is based on actual invoices of Parke, Davis & Company and rebates from the company.

IX. B. (6) (e)

The claim for damage is based only on the difference between the net wholesale cost from local wholesalers and the net cost on a direct basis from Parke, Davis & Company. See Schedules 5-9, which set forth the total dollar damage resulting from the higher cost of Parke, Davis & Company merchandise that was obtained and also the damages on merchandise which could not be obtained.

IX. B. (6) (f)

The selling price is dictated by prices being charged by other retailers in similar type of business and such prices change from time to time. The claim being made is not in any way based on the selling price of Parke, Davis & Company merchandise.

IX. B. (6) (g)

The selling price would be same as under item IX. B. (6) (f). The source of the merchandise would have no effect on the selling price. The selling price is determined by competitive conditions.

IX. B. (7)

Plaintiffs believe this interrogatory is answered by answers I through IV.

IX. B. (8)

The documents which would relate to purchase of Parke, Davis & Company merchandise from wholesalers would be the wholesaler's invoices.

IX. B. (9)

None.

IX. B. (10)

Charles D. Shipe, Vice President, Dart Drug Corporation.

IX. B. (11)

Individuals who would have casual knowledge of such purchases would be store clerks, store stock clerks, various and sundry order takers, and stock clerks of local wholesalers.

X. A. Yes.

X. B. (1)

Henry B. Gilpin Company

District Wholesale Drug Company

X. B. (2)

Many attempts were made during the period January, 1958 to date to obtain several dozen of a particular Parke, Davis & Company product. These attempts were made by telephone and no written records were made. The invoices of Henry B. Gilpin Company and District Wholesale Drug Company show that even when small quantities were ordered by an individual Dart Drug store, many times the wholesaler would show "out of stock".

Attached as Exhibit A is a photocopy of Parke, Davis & Company invoice #10045, showing a typical quantity order of several Parke, Davis & Company items. The stock levels maintained by the local wholesalers would not permit orders of this size from them. The invoice #10045 was for merchandise delivered to only one store, 1801 Columbia Road, N.W., Washington, D. C. The quantities of these products that were needed for thirteen stores would be proportionately increased by approximately thirteen fold.

X. B. (3) (a)

The individuals who contacted the potential sellers as to quantities of purchases were:

Herbert H. Haft

Nathan Eidelman

In addition, store managers and assistant managers contacted the potential seller on a day to day basis for routine purchases at store level. See answer to IX. B (2) for listing of these individuals.

X. B. (3) (b)

The principal individuals acting on behalf of the potential sellers were:

Henry B. Gilpin Company - James Carr

District Wholesale Drug Company - Phillip Levin

In addition, the numerous telephone order takers of these companies were contacted on a day to day basis by the store manager and assistant store managers of Dart Drug Corporation.

X. B. (3) (c)

The Parke, Davis Company products which Dart Drug was unable to obtain were:

SG Cap 240 Abdol with Minerals - 100's

Kat 363 Combex - 100's

SG Cap 234 Myadec - 100's

Comfort Powder - 4 oz.

Comfort Powder - 10 oz.

HF Cap 470 Nutritive - 100

Paladac - Pint

Siblin - 1 lb.

Kap 382 Geriplex - 100

SG Cap 218 Abdol with Vitamin C - 100

Kap 367 Combex with Vitamin C - 100

Kap 371 abdec - 100

Abdec Drops - 50cc

Cosanyl - 4 oz.

Medicated Throat Discs - 12's

Caladryl Lotion - 6 oz.

Caladryl Cream - Tube

Ziradryl Lotion - 6 oz.

Oint 71 Ziradryl Cream - 1 oz.

Kap 390 Natabec - 100

SG Cap 239 Abdol w/Minerals for Child - 100

Pill 974 Alophen - 100

Abdec Drops Flavored - 50cc

CT 690 Antacid - 36

CCT 55 Cascara Sagrada Extract 5 gr. - 100

Pill 974 Alophen - 30

Lavacol Scented - Pint

X. B. (3) (d) (i)

See answer to X. B. (2).

X. B. (3) (d) (ii)

The price which Dart offered for such merchandise was Parke, Davis & Company list price (i.e., Suggested Selling Price) less 33 1/3%.

X. B. (3) (e)

None.

X. B. (3) (f)

Henry B. Gilpin Company

Stock Level Records

District Wholesale Drug Company

Stock Level Records

XI. None.

XII. A. Plaintiffs believe that this interrogatory is answered by answer XII. H. (5).

XII. B. August, 1961

XII. C. Charles D. Shipe

XII. D. Charles D. Shipe

XII. E. See Schedules 1 through 9 attached.

XII. F. See Schedules 1 through 9 attached.

XII. G. Parke, Davis & Company invoices, Sales Records of Dart Drug Corporations.

XII. H. (1)

See Schedules 5, 6, 7, and 8, attached.

XII. H. (2)

August, 1961

XII. H. (3)

Charles D. Shipe

XII. H. (4)

Charles D. Shipe

XII. H. (5)

The damages suffered by Dart Drug Corporation are set forth as computed in Schedules 1 through 9 and included with the answers to these interrogatories.

The basis for the damages incurred by Dart Drug Corporation is a determination of the amount of merchandise purchased direct from Parke, Davis & Company during the period January 1, 1956 through December 31, 1957 as compared on a percentage basis to the total sales of the Dart Drug Corporation stores in existence during the same period. The purchases from Parke, Davis & Company and the sales of the Dart Drug Corporation stores during the period January 1, 1956 through December 31, 1957 are set out in Schedules 1 and 2 which were prepared by Vinton Lee & Company, Certified Public Accountants. A letter certifying to the accuracy of these figures is enclosed.

The percentage thus obtained (of 1.9863%) is applied to the total sales for each calendar year subsequent to 1957 to determine a projected dollar amount of purchases from Parke, Davis & Company for each such calendar year. No attempt is made to take into account that Parke, Davis & Company's share of the total drug industry volume increased during the period. Nor is any attempt made to relate to our claim that the discount druggist obtained a larger share of the Washington vitamin market during this period. The projected purchases of merchandise from Parke, Davis & Company for each calendar year subsequent to December 31, 1957 are set forth in Schedules 5, 6, 7 and 8 of these answers.

Having determined the projected purchases of Parke, Davis & Company merchandise for each calendar year, the damages are computed on the difference in cost of such merchandise on a direct basis from Parke, Davis & Company as compared to the cost paid to a service wholesale drug company for the same merchandise.

The net cost of merchandise obtained from Parke, Davis & Company is set forth in Schedule 3 as 45.96% of Parke, Davis & Company's suggested selling price. The cost of the same merchandise obtained from a service wholesaler was 66 2/3% of Parke, Davis & Company's suggested selling price. The damages suffered by Dart Drug Corporation is the difference between the 66 2/3% cost and the 45.96% and is set out in a dollar amount in Schedules 5 through 9, with totals as follows:

Schedule 5 (1958) Loss	$ 16,199.58
Schedule 6 (1959) Loss	27,580.83
Schedule 7 (1960) Loss	45,344.42
Schedule 8 (1961) Loss	28,029.43
Schedule 9 Total per Schedules 5 through 8	$117,154.26
Plus loss of profit arbitrarily fixed	25,000.00
Total claim of damages	$142,154.26

XII. H. (6)

See Schedules 1 through 9 attached.

XII. H. (7)

Parke, Davis & Company Invoices and Sales Records of Dart Drug Corporations.

/s/ Herbert H. Haft
President
Dart Drug Corporation
and Each Other Plaintiff Corporation
Plaintiffs

[JURAT dated June 25, 1962]

/s/ Frederick T. M.Crowley
Attorney for Plaintiffs
* * *

[Filed November 5, 1962]

ADDITIONAL ANSWERS TO INTERROGATORIES PROPOUNDED TO PLAINTIFF DART DRUG CORPORATION BY DEFENDANT PARKE, DAVIS & COMPANY

The defendant, having filed a Motion to Compel Answers to Interrogatories I-B, I-C, V, VIII-B, IX-B, X-B and XII herein, and the parties by their respective counsel having agreed that as to Interrogatories VIII-B and IX-B additional answers would be given covering a sample period of July 1, 1959 to June 30, 1960 in the hope that further such complete answers would not be necessary for the full period involved in this litigation, ie., 1958 through 1961, answers for such sample period are therefore provided herein. Interrogatories I-B, I-C, V, X-B and XII are also additionally answered as demanded.

1. Additional Answers to Interrogatory I-B

Plaintiffs claim that the 1957 cut off was the direct result of the combination and conspiracy found to be illegal by this Court. In other words, plaintiffs contend that if it had not been for the unlawful combination and conspiracy engaged in by defendant, plaintiffs would not have been cut off in 1957 by the defendant. The United States Government in 1956 filed both criminal and civil cases against the defendant charging it with engaging in an unlawful combination and conspiracy to maintain resale prices. The criminal case was tried first, the trial having taken place during November 1957. At this trial, Herbert Haft, President of the Dart Drug chain, was the Government's principal witness. At the conclusion of the Government's evidence the trial court directed a verdict of acquittal in favor of the defendant. Shortly thereafter Herbert Haft was notified by Parke, Davis that that company did not wish to have any further business relations with Dart Drug. After this cut off, counsel for the Government filed an affidavit with the Court urging that the defendant was punishing Mr. Haft for his testimony in the criminal case and asking the Court to expedite the trial of the civil case. In response to this affidavit the defendant advised the Court that the cut off was the result of several things, including the fact that the statements made by Mr. Haft on the stand did not agree with the views of the Parke, Davis employees involved in this situation.

The civil case went to trial in June of 1958 and once again the trial court dismissed the action after the Government had presented its case. The Government appealed to the Supreme Court and in February 1960 the Supreme Court reversed the District Court and remanded the case. In its opinion, the Supreme Court specifically refers to the illegal action taken against Dart Drug. Furthermore, the judgment against the defendant finally entered by this Court also refers specifically to the illegal actions against Dart Drug. The plaintiffs' claim is based on these illegal actions and upon the fact that the 1957 cut off was a direct effect of these illegal actions. Plaintiffs have no present knowledge of whether defendant made agreements with third parties to undertake the 1957 cut off. Plaintiffs reassert that the 1957 cut off was the direct result of defendant's illegal activities.

2. Additional Answers to Interrogatory I-C

Does not need to be answered.

3. Additional Answers to Interrogatory V

The plaintiffs' claims in this case are based upon the combination and conspiracy entered into by the defendant which has already been declared illegal by this Court. The conduct of the defendant on which the plaintiffs' claims are based is the same conduct which formed the basis of the United States Government's suit against the defendant which has been described in the answer to Interrogatory I-B. Plaintiffs have no present knowledge whether defendant has engaged in illegal conduct other than that described in the answer to Interrogatory I-B. Defendant's statements seem to indicate that it is seeking to change the nature of this suit. Plaintiffs reassert that their claims are based on defendant's actions which have already been adjudged illegal by this court, which illegal actions have damaged plaintiff's business.

4. Additional Answers to Interrogatory IX-B

(1) See Schedule ~~9~~.[15]

(2) "Identify each individual who acted in your behalf." This information is given in our original answer.

(3) See Schedule ~~9.~~ [15]

(4) "Identify each individual who acted in behalf of the seller in the transaction." See our prior answer and add: On attempts to buy large, "special" orders of merchandise we talked to the district Sales Manager for Henry B. Gilpin Company, Mr. James R. Carr. At the District Wholesale Drug Company we talked to Mr. Phillip Levin, Vice President. At the Brandywine Clinic we talked to Dr. Richard H. Dobson.

(5) See Schedule ~~9.~~ [15]

(6) (a) See Schedule ~~9.~~ [15]

(b) See Schedule ~~9.~~ [15]

(c) The answer is None.

(d) "The unit price at which you claim that you would have purchased such product if such purchase had been made from Parke, Davis & Company." We are unable to give individual unit prices because they varied depending on the "deal" that was available, the quantity bought, the amount of "Premium on Resale", etc. Based upon our purchases that we actually made from Parke, Davis & Company during January 1, 1956 to December 31, 1957, we have computed that our "Net Cost" of Parke, Davis & Company merchandise was 45.96% of the Suggested Retail Selling Price. (See Schedule 3 of our original answer.) Based on this factor we have computed the cost of the merchandise had it been purchased from Parke, Davis & Company. This computation has been made by each plaintiff by calendar quarters.

(e) "The amount of damage, if any, which you claim you sustained in such purchase of such product." The damage suffered by each plaintiff is being submitted. See Schedule 14. The damage is computed by calendar quarters and not by each unit for the same reason given in answer to IX-B (6) (d).

(f) "The unit price at which you resold such product." The selling price on the Parke, Davis & Company merchandise varies from day to day. The everyday price varies depending upon competition. We always meet or beat all competitors. The prices as they appeared in the Washington Post on various days during September to November, 1959

(see Schedule 13) varied from ad to ad. We do not keep records on the selling prices of the over 30,000 items that we have in each store. Therefore, we are unable to supply the answer to this question, except as to the general information, as follows: As to Parke, Davis inquiry to our selling prices, we have established our "suggested everyday prices to our store managers on a few of the more popular vitamins products and this information is included in Schedule 12. However, the manager had the leeway to sell for more or less, if in his judgment the competitive conditions in his immediate area warranted a different price. As to the stores located in the State of Maryland, we had a Court Injunction prohibiting us from selling below the Fair Trade price.

(g) The selling price would be the same regardless of the source of the Parke, Davis & Company merchandise. The selling price is fixed by competitive conditions and not by the cost of the item. We have sold much Parke, Davis & Company merchandise at below our cost to meet the prices of competitors who were buying it cheaper than we were.

(7) See answers to Interrogatories I-B and V.

(8) The documents which relate to these purchases are the wholesalers' invoices that we detailed in the working papers. (See Schedule ~~9.~~ [15])

(9) This answer was supplied in our original answers.

(10) "Identify each individual who participated in the preparation of your answers with respect to such purchase." The working paper schedules setting out the wholesale purchases of Parke, Davis & Company merchandise were done by:

Eugene Blackwell of Washington Wholesale Drug Exchange

Jack Riggin of Henry B. Gilpin Company

The clerical work and schedule computations were done by employees of Dart Drug Corporation

Gloria Pryor

Charlotte Gural

The overall supervision of the preparation of these answers was by

Charles D. Shipe, Vice President

(11) This answer is in our original answers.

5. Additional Answers to Interrogatory VIII-B

(1) "Identify each Parke, Davis & Company product which you claim you would have purchased in greater quantities in such quarter in the absence of the alleged unlawful conduct." Various items are listed in our original answers. In addition, see Schedule 10, a ten page listing of "Outs." These items would also have been purchased from Parke, Davis & Company.

(2) "Give the following information as to each product identified in your answer to Interrogatory VIII-B (1) (giving such information separately for each such product):" The information requested "separately for each such product" for each plaintiff and by calendar quarters cannot be supplied. We did not and do not now maintain records of sales of the various and many products of the Parke, Davis & Company. We have also ascertained that neither of the two largest service wholesalers in Washington, D.C. maintain a record of their sales of Parke, Davis & Company merchandise. The two service wholesalers employ punch card inventory accounting records and even with this equipment do not keep such records as Parke, Davis & Company is asking us to compile.

To answer this interrogatory in the manner which is asked would require over 22,000 separate answers.

The estimated total dollar value of the Parke, Davis & Company merchandise which we would have purchased is set forth for each plaintiff for the period July 1, 1959 to June 30, 1960. (Schedule 11)

(a) We are supplying (Schedule 11).

(b) We are supplying (Schedule 11).

(c) We are supplying (Schedule 11).

(d) "State the total amount of the expenses which you would have charged under your ordinary accounting principles to your sales of such quantity of such products." No additional expenses would have been incurred because of the sale of the products. These additional sales would not affect rent expenses, depreciation, salaries, utilities, etc., and therefore no expenses would be charged under our ordinary accounting principles.

(e) We are supplying (Schedule 11).

(f) We are supplying (Schedule 11).

(g) Charles D. Shipe, Vice President, Dart Drug Corporation.

(h) Invoices and Records for the period July 1, 1959 - June 30, 1960 as follows:

Invoices of Henry B. Gilpin Company

Invoices of District Wholesale Drug Company

Sales records of each of the plaintiffs

Invoices of Parke, Davis & Company as set forth in Schedule 3

Drug Topics Red Book - 1959 Edition

Dart Drug Newspaper Advertisements of 9/17/59, 10/22/59, 11/12/59, and 11/19/59.

6. Additional Answers to Interrogatory X-B

The approximately 2600 occasions on which merchandise was purchased from service wholesalers during the period July 1, 1959 to June 30, 1960 are all positive proof that effort was made to purchase Parke, Davis & Company merchandise. Each and every one of these purchases had to be approved by a store manager or assistant manager. The ten pages of "Outs" sheets (Schedule 10) listing also testify to efforts by store managers or assistant store managers in which they were unsuccessful.

As stated in our original reply to this inquiry, many efforts were made. However, Mr. Eidelman nor Mr. Haft is able to recall at this time the specific products involved, the time, the price, etc.

The most specific that we can be, is that these efforts were made with greatest intensity during December, 1957 and early 1958 without success. The products that the greatest effort was made on was the over-the-counter vitamin products, i.e., Abdol with C, Abdol with Minerals, Paladec, Natabec, Geriplex, ABDEC Drops, etc. These items are the ones in which the greatest dollar volume is concentrated and which are most subject to "special deal" prices by Parke, Davis & Company to its retail customers. The individuals contacted are listed in our original answers.

It must be borne in mind that Parke, Davis & Company purchases amounted to less than 2% of our total purchases and that during the period December, 1957 through December, 1959, Mr. Haft was the sole "Buyer" other than store managers. In addition to being "Buyer", he handled all store leasing, fixturization, financial discussions, advertising, and litigation.

7. Additional Answers to Interrogatory XII-A

We are submitting to you thirty-seven schedules breaking down our claim as to each plaintiff for each year. (See Schedule 14.)

8. Additional Answers to Interrogatory XII-B

Answers to Interrogatories XII-B through H are the same for each plaintiff and were answered in the original answers.

9. "Interrogatories as to Documents". Documents are identified in the attached schedules.

/s/ Herbert H. Haft
President
Dart Drug Corporation
and Each Other Plaintiff Corporation
Plaintiffs

[JURAT dated November 2, 1962]

/s/ Frederick T. M. Crowley
Attorney for Plaintiffs

* * *

DEPOSITION OF HERBERT H. HAFT

Washington, D.C.,
Tuesday, Feb. 19, 1963

Deposition of

HERBERT H. HAFT,

president of the plaintiff corporations, called for examination by counsel for the defendant, pursuant to written notice, at the law offices of Covington & Burling, Suite 701, Union Trust Bldg., Washington, D. C., before Joseph J. Pastore, a notary public in and for the District of Columbia, beginning at 2:00 o'clock p.m., when were present on behalf of the respective parties:

FREDERICK T. M. CROWLEY, ESQ.,
for the plaintiffs.

COVINGTON & BURLING
By ROBERTS B. OWEN, ESQ.,
for the defendant.

* * * * *

PROCEEDINGS

MR. OWEN: Before I begin the questioning, I would like to state for the record that it has been agreed between counsel that this deposition, which is being taken in a suit for damages, will be confined to issues other than the questions of the amount of damage and the computation of that amount. It has been agreed that questioning on the latter issues will be postponed for a later time and that the defendant shall have the right to take a second deposition of Mr. Haft on the latter issues if the defendant subsequently decides that such a deposition is necessary.

Is that a fair statement, Mr. Crowley?

MR. CROWLEY: Yes. That is what we agreed.

Thereupon,

HERBERT H. HAFT

was called for examination by counsel for the defendant and, after having been duly sworn by the notary, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANT

BY MR. OWEN:

Q. Would you state your name and address? A. Herbert H. Haft, 5458 3rd Street, N. E., Washington, D.C.

4 Q. And you are the president of the plaintiff corporations in this case; is that correct? A. Yes.

Q. The plaintiff corporations are in the business, are they not, of purchasing pharmaceutical products and reselling those products at retail? A. Yes.

Q. And in 1957 and prior years the plaintiffs were purchasing Parke-Davis products from Parke, Davis & Company, the defendant in this case; is that correct? A. Yes.

Q. Now, do you recall, Mr. Haft, that in the fall of 1957 a criminal trial took place here in the District of Columbia and that you were involved in that criminal trial? A. Yes.

Q. And do you also recall that that trial was based in part upon certain dealings which took place between you and Parke, Davis & Company in 1956? A. Yes.

Q. And you recall, do you not, that you testified at that trial? A. Yes.

Q. And it is true, is it not, that one of the subjects about which

5 you testified at the 1957 criminal trial was the dealings which had taken place between you and Parke, Davis & Company in 1956? A. Yes.

Q. Do you also recall, Mr. Haft, that certain Parke, Davis & Company employees testified at that criminal trial? A. Yes.

Q. Did you hear their testimony? A. I do not think so.

Q. Did you review their testimony later in the form of a transcript? A. Yes.

Q. So that you are generally familiar with the substance of what they said? A. No. Not at the present time. I reviewed the transcript a few years ago. I am not as of now familiar with it.

Q. But you were at one time aware of their testimony? A. Yes.

Q. Do you recall that there were certain inconsistencies between the testimony which you gave at that trial and the testimony which these employees of Parke, Davis & Company gave? A. Yes.

Q. Now, do you recall that this criminal trial came to an end in
6 November 1957? A. Yes.

Q. And that shortly after the end of that trial you were advised by Parke, Davis & Company that Parke-Davis no longer wished to do business with you and that they were permanently closing your account? A. Yes.

Q. Do you recall how you received that advice from Parke, Davis & Company? A. In the form of a letter.

Q. Do you remember the date of that letter? A. No.

Q. I show you a printed volume which is entitled "Transcript of Record, Supreme Court of the United States, October Term, 1959, No. 20, United States, Appellant, against Parke, Davis & Company," and I call your attention to page 307 of this printed volume and particularly to the bottom of the page where there is printed a letter which purports to have been written by Kenneth D. McGregor, vice president, secretary, and general attorney of Parke, Davis & Company, dated December 12, 1957, addressed to Dart Drug Company, 18th and Columbia Road, Washington, D.C.

Would you look at that printing and tell me whether that is the letter
7 to which you have just referred in your testimony? A. Yes.

Q. And you received the original of that letter? A. Yes.

Q. I take it you received it a few days after December 12, 1957? A. I would think so.

Q. Now, I take it that it is your claim in this case that you have been unable to purchase any Parke-Davis products from Parke, Davis & Company since the receipt of that letter. Is that correct? A. I do not recall if there might have been some merchandise that was in transit that might have been received, but substantially since the receipt of that

letter we have been unable to purchase from Parke-Davis. Just in the back of my mind it seems that there might have been one order which was in transit that was received, but I'm not completely sure of that.

Q. Leaving aside the question of orders in transit, your claim is that you have not been able to purchase any Parke-Davis products from Parke-Davis since that time? A. Yes.

Q. So that, in effect, Dart was cut off completely by Parke, Davis
8 & Company at the end of 1957? A. I'm not sure of the date, but from the period that they cut us off.

Q. Well, I showed you a letter dated December 12, 1957, and, as I understand your testimony, that was the cut-off itself. A. Yes. This is the cut-off, to the best of my knowledge.

Q. So, leaving aside the goods that might have been in transit, you were effectively cut off as of December 12, 1957; is that correct? A. Yes.

Q. And I take it that, as a result of that cut-off, you claim that certain injury was done to your business. A. Yes.

Q. And it is that injury which is the basis of this lawsuit? A. Yes.

Q. And in this lawsuit you are seeking compensation for that injury? A. Yes.

Q. Have you ever had any communication, Mr. Haft, from any employee of Parke, Davis & Company as to the reason why Parke, Davis & Company cut you off at the end of 1957? A. Referring to the letter
9 communication?

Q. No. Apart from the letter which you received in December 1957 and which you have identified, have you ever received any communication, either oral or written, from any Parke-Davis employee as to the reasons why they cut you off? A. Are you referring to subsequent to the letter?

Q. Subsequent to the letter, yes, sir. A. In order to understand you correctly, you don't want to go into any communications before the letter?

Q. That is correct. I am interested in any communication,

whether it be a conversation or a telephone call or a letter or a telegram, which you may have had from an employee of Parke, Davis & Company about the reason why Parke-Davis cut you off at the end of 1957. A. We have had communications that they would not continue to sell us, that they would not start reselling us, but whether those communications gave reasons or not I do not know, or whether they gave reasons why we were cut off I do not recall.

Q. Is it your impression that any reason was given in these communications? A. Yes, yes. We had a fair-trade suit in the State of Maryland where the Parke-Davis Company sued Dart Drug Corporation

10 for not maintaining prices in the State of Maryland and at that time we had communication with them to the effect that they could not seek both relief on fair trade and at the same time refuse to sell. In fact, that is pending in the courts. And there was a Parke-Davis representative -- I don't recall his name -- that I met in the hallway in between sessions, who you can probably look up in the transcript, who told me that they were pretty angry about this Justice Department action and maybe it would blow over in time and they wouldn't be angry any more and possibly sell me. I'm trying to think of his name.

Q. Did you say that he was a representative of Parke, Davis & Company? A. Oh, yes, yes.

Q. Do you mean by that -- A. He was a Parke-Davis employee who testified for Parke-Davis in the fair-trade action.

In addition, there have been other instances, but I would have to refresh my memory on them.

Q. But your recollection of the conversation which took place in the hallway to which you have just referred is that the Parke-Davis employee told you that Parke, Davis & Company was angry at you because of the Government lawsuit; is that correct? A. That's right.

11 Q. Apart from that conversation, can you recall any other communications in which any representative of Parke, Davis & Company has told you why or indicated in any way to you why Parke, Davis &

Company cut you off? A. I'm sure there were others, but I would have to refresh my memory. I'd have to think about it. I don't recall now. None come immediately to mind. But in the back of my mind there is another.

Q. I would like to know what other there is. A. I do not know at the present time.

Q. How would you propose to refresh your recollection on that subject? A. I would speak to some people in my organization who would recall the name of a particular man I had in mind.

Q. And with whom would you speak in your organization? A. It would be one or two of the gentlemen who do the buying at the present time, Mr. Eidelman or Mr. Kovalsky.

Q. It is your impression, I take it, that these two gentlemen have had some conversations with -- A. No. I had the conversation. I don't know whether he was in Parke-Davis' employ at that time or he had left their employ.

12 Q. How would either of these gentlemen know about that conversation if the conversation was between you and the Parke-Davis employee? A. I brought it to their attention that he had come around to see me. Whether it was right before he left Parke-Davis' employ or while he was still in their employ I don't know.

Q. Do you have any present recollection as to the reason which was indicated by that Parke-Davis employee? That is, the reason for the cut-off. A. Yes. He said they had a vindictive feeling regarding Dart Drug and they were going to refuse to sell me in order to even up the score on the Government case.

Q. In other words, it was your role in the Government case, as far as you understand the facts -- A. Yes.

Q. -- which prompted the cut-off in December 1957? A. Yes.

Q. Now, it is true, is it not, that, to state your claim a little more specifically, the reason for the cut-off was that you testified at the criminal trial in the fall of 1957 and that certain Parke-Davis employees disagreed with the views that you had expressed on the stand and that

that gave rise to a feeling of hostility which in turn resulted in the cut-off? Is that correct? A. The question is too long. I've lost you. I'm
13 sorry.

Q. Fair enough.

You have filed certain answers to interrogatories in this case, have you not, Mr. Haft? A. Yes.

Q. Do you recall that you filed certain answers on November 2, 1962? A. I don't recall any specific dates of these answers. These answers were prepared by members of my organization together with counsel for my signature, and I read them generally. But if you want any specific answers, you will have to refresh my memory specifically by reading them to me.

Q. Do you recall that in the answers which you did make in this case you stated, in effect, that Parke, Davis & Company had cut you off in December 1957 because the testimony which you gave at the criminal trial did not agree with the views of certain Parke-Davis employees? A. Would you read that to me specifically?

MR. CROWLEY: Where are you in the answers?

MR. OWEN: I was not actually quoting from the answers. I was stating the substance of one of the answers which you gave.
14 MR. CROWLEY: Would you want to refer to the answer?

MR. OWEN: I will try to find the reference.

Mr. Crowley, would you show him your copy of the second set of answers which Mr. Haft made on November 2, 1962?

MR. CROWLEY: Is this additional answers to interrogatories?

MR. OWEN: That is correct.

BY MR. OWEN:

Q. And I refer you, Mr. Haft, to the top of the page, reading down to a sentence which begins with the words --

MR. CROWLEY: Page 2, you mean?

MR. OWEN: Yes. Page 2. The third full sentence on page 2 begins with the words "In response to this affidavit."

BY MR. OWEN:

Q. Do you find that sentence? A. Yes.

Q. "-- the defendant advised the court that the cut-off was the result of several things, including the fact that the statements made by Mr. Haft on the stand did not agree with the views of the Parke-Davis employees involved in this situation." A. Yes.

Q. So that, as I understand your claim in this case, it is that
15 Parke, Davis & Company cut you off in December of 1957 because certain Parke, Davis & Company employees disagreed with what you had said on the stand in the criminal case. Is that correct? A. These are only my thoughts on the subject. I can't read into Parke-Davis' mind what activated them. There could have been other reasons besides.

Q. But that is your view of the facts? A. This is my best view, plus the other pressures that were brought on by various other drug retailers, etc.

Q. Would you explain that last comment? What other pressures were brought to bear prior to this cut-off? Let me confine my question to the year 1957. Were any pressures brought to bear upon Dart by any other retailers? Did I understand your comment correctly? A. The action of Parke-Davis of placing pressure on Dart was initiated in response to pressures from other retailers on Parke-Davis, other retailers saying that, "If you do not take action to get Dart's prices back into line, we will no longer have a kindly feeing towards Parke-Davis in the sale of their merchandise."

Q. How do you know that, sir? A. This was presented to us when the original Parke-Davis representatives came to us prior to the
16 initiation of these suits.

Q. Let me see if I understand you. You are now talking about the events which took place in 1956; is that correct? A. Yes. Prior to the Government criminal and civil suits.

Q. So that the pressures to which you were referring are all pressures which were exerted in 1956 and out of which the criminal case derived; is that correct? A. Criminal and civil, yes.

Q. Now, it is your claim in this case, is it not, Mr. Haft, that the 1957 cut-off was the result of the alleged antitrust violations which took place in 1956? A. That among the other things that we discussed, yes.

Q. To what other things are you referring? A. To the pressures from other retailers, the hostility of certain officials who were charged criminally, and --

MR. CROWLEY: I would like to interrupt, if you please, and ask that the question be read back. I didn't quite get what you asked.

MR. OWEN: My question was whether or not it was Mr. Haft's claim in this case that the 1957 cut-off was the result of the alleged 1956 antitrust violations.

17 MR. CROWLEY: I object to the use of the term "alleged," since it has been a finding of the Supreme Court that, as a matter of law, Parke-Davis was guilty of these allegations.

MR. OWEN: Your objection is noted.

MR. CROWLEY: All right. Proceed.

MR. OWEN: I would like the witness to answer the question.

THE WITNESS: Yes.

BY MR. OWEN:

Q. So that I take it that it is your claim that, if the alleged 1956 antitrust violations had not taken place, you would not have been cut off. Is that correct? A. Yes.

Q. Or, to put it a little more specifically, if the alleged antitrust violations had not taken place in 1956, then there would not have been a criminal case at which you testified and there would have been no cut-off in 1957; is that correct? A. Yes.

Q. Now, let me see if I can recapitulate the events, as you understand them, Mr. Haft. And this will be repetitive of prior questions, but I want to get the order straight.

To begin with, you claim that there was an antitrust violation in 1956, is that correct? A. Yes.

18 Q. And that, as a result of that alleged antitrust violation, a complaint was filed with the Antitrust Division of the Department of Justice; is that correct? A. Yes.

Q. And that, as a result of that complaint, there was an antitrust investigation by the United States Government? A. Yes.

Q. And that, as a result of that investigation, a criminal case was brought by the United States? A. Yes.

Q. And that, as a result of the criminal case having been brought, you were called as a witness to testify? A. Yes.

Q. And that, as a result of your testimony, a disagreement came into being between you and Parke, Davis & Company; is that correct? A. Yes.

Q. And that, as a result of that disagreement, the Dart Drug corporations were cut off by Parke-Davis?

MR. CROWLEY: I object. The questions are moving along too fast.

MR. OWEN: May the witness answer the question?

19 MR. CROWLEY: You have asked the last two questions rather rapidly, and I think you ought to go back to the question before this and let him hear it again.

MR. OWEN: I believe he has already answered the question before this.

MR. CROWLEY: While he was answering you asked him the next question. For that reason I think his thinking has been interfered with. If you don't mind --

MR. OWEN: I beg your pardon. Let us go back.

I believe that my next-to-last question was, as a result of the criminal trial and the testimony given by Mr. Haft, a disagreement arose between the Dart Drug Company or between Mr. Haft and Parke, Davis & Company, and that, as a result of that disagreement, Parke, Davis & Company cut off Dart at the end of 1957.

THE WITNESS: Your last question is not a statement of fact. It is an oversimplification. The cutting off by Parke-Davis cannot be

attached as a result of a disagreement with -- on a personality basis only. It's due to the pressures of other retailers, the conspiracy that they entered into with the wholesalers and the retailers and the whole action; and to rephrase a question that you asked me before that the only reason that Parke-Davis stopped selling was merely a personality
20 conflict, that, in my mind, is not a statement of fact.

BY MR. OWEN:

Q. I have inquired of you before as to what other reasons were involved in the cut-off. A. And I have answered you before.

Q. And the answer was these pressures to which you referred. A. The answer was a multiplicity of things. It was not merely the pressures. I tell you respectfully it was the items that were enumerated.

Q. Perhaps I need to have my recollection refreshed as to the factors you did enumerate. A. I would respectfully refer you to the record, if you care to.

Q. Let me ask you this, Mr. Haft; did Parke-Davis & Company sell you goods in 1956? A. When in 1956?

Q. Let us say September through December. A. I can't tell you specific months. A period of time has elapsed. But there was a period when they stopped selling me and then they resumed and then they finally cut me off, and I do not know the exact dates during that period of time.

Q. It is the fact, is it not, that prior to the 1957 cut-off -- that is,
21 the cut-off that occurred at the end of 1957 -- you had been consistently purchasing Parke-Davis goods from Parke, Davis & Company all through the year 1957? A. Without going back to the records, I would not know. It is a recollection on my part that there was a period before the cut-off in '57 when Parke-Davis did not ship me.

Q. And that was in the fall or late summer of 1956, was it not? A. Somewhere in there. It could be in '56 or sometime in '57. My recollection is not too good.

Q. I suggest to you, Mr. Haft, that the interruption in your dealings with Parke-Davis was in the late summer or early fall of 1956 and

that thereafter you continued to purchase Parke-Davis products consistently through December 1957. A. If this is the record -- and you have the record -- this would be a statement of fact.

Q. Now, given those facts, is it your claim that the pressures which existed, according to you, in the fall, let us say, of 1956 led to the cut-off at the end of 1957? A. Yes.

Q. I am afraid I don't understand that. Why in your view, then, did Parke-Davis not cut you off at the end of 1956 rather than a year later? A. You are talking about a year later, and it is an over-
22 simplification. You have to look at the entire record and get the sequence of dates. There was a continual fabric of events which tied in. The original time of pressure, negotiation, a first cut-off period on their part to apply pressure on me, then a partial reselling, then negotiations to form the conspiracy with the other chains where they had meetings with people and with the various wholesalers, and then --

Q. All of these events occurred in 1956? A. Just a minute.

MR. CROWLEY: Please let him answer, because there were many events.

THE WITNESS: If you don't let me answer, I can't give you the answer you require.

BY MR. OWEN:

Q. Go ahead and answer the question. A. The negotiations where they tried to enter into the conspiracy with the wholesalers and the various retailers. And as to the period of time between when they actually sold me and they sent me this letter, you have to bear in mind that this letter is finally a culmination of a period of time when they would lose my orders, where I would call the various officials of the company, trying to get an answer, and they refused to talk to me, or they told me
23 they don't have to put anything in writing.

So taking the sequence of the period of time, your question, which you put in the form of a statement, is untrue.

Q. What statement was untrue? A. The statement that they waited a year to take action. They were taking action all the time.

Q. Let me then go back over that, if I may.

Of what action by Parke, Davis & Company do you have knowledge which related in any way to the 1957 cut-off and which occurred after September 1956? A. You give me a question again which I can't answer you because I don't follow you. I'm sorry. Would you repeat the question? I will try to follow it.

Q. Let me rephrase the question. A. Yes.

Q. As I understand it, you are suggesting that in the period when the antitrust violations terminated, which is September 1956, and up to the cut-off in December 1957, Parke, Davis & Company took certain action with respect to you. Is that correct? A. Let me say this: without going to the record, I don't know that the antiturst actions stopped in '56. I do not know the sequence of events. I cannot give you an answer
24 of something that I do not have a recollection of. I can only state to you, if you will give me a chance to look into the sequence of the dates and events, I could answer you. At this time I am not prepared to give you an answer.

Q. You have taken the position in your answers to the defendant's interrogatories, have you not, that Parke-Davis, so far as you know, took no action at all between January 1, 1957, and December 12, 1957, with respect to this situation?

MR. CROWLEY: I object to the question.

THE WITNESS: Sir, I don't know what situation you are talking about.

MR. CROWLEY: I think the answers themselves are the best evidence of that at this point.

What answer do you refer to?

MR. OWEN: I am asking for his recollection.

THE WITNESS: Your question is still not clear.

MR. CROWLEY: You stated that the answers to the interrogatories made this statement. Now, I think that we should refer to that answer or answers.

MR. OWEN: Off the record.

(Discussion off the record.)

25 BY MR. OWEN:

Q. Mr. Haft, do you claim that at any time during the year 1957 prior to December 12 of that year any unlawful action was taken by Parke, Davis & Company? A. I will have to refresh my memory by reading through this, it's been such a long period of time, in order to get the exact dates, if I might, with your permission.

Q. All right; if you would refresh your recollection. A. And would you please read the question back to me?

(Pending question read by reporter.)

THE WITNESS: (after reading document): Yes.

BY MR. OWEN:

Q. What action are you referring to? A. (A) Our shipments were sometimes lost and, in my opinion, based on my past dealings, there were too many orders that were lost to be merely a normal loss of an order during the ordinary conduct of business.

Number -- next Parke-Davis unlawfully held back the knowledge of certain discounts which they were giving other retailers and gave other retailers preferential treatment with regard to same.

In substance, we did not get the complete and full shipments of merchandise and of service coverage that were formerly afforded us

26 and the shipments and service we got were only a token-type operation.

Q. Do you have records, sir, from which we could ascertain whether orders were lost during the calendar year 1957? A. No, we do not.

Q. Now, you have just alleged that Parke-Davis unlawfully held back information as to certain discounts. A. Yes.

Q. On what basis do you make that statement? A. If you will go into one of the records, you will find that there was a discount due at the end of the year which had not been brought to Dart's attention.

Q. How did you learn of this discount? A. We learned of it through

an employee, a former employee, of Parke, Davis & Company.

Q. And what was his name? A. I would have to look back in our records to see if we can find out. He left the employ of Parke-Davis to become a physician.

Q. And on what basis do you now allege that you did not obtain the goods and services to which you would ordinarily have been entitled? A. On the basis of performance. Parke-Davis, prior to this conspiracy,
27 would visit the retail stores and check the stock, take care of certain outdated or broken merchandise, and make adjustments thereof, provide certain window display material, certain displays, make available to us certain deals, and we did not get this type of servicing during this period of time.

Q. Did you have any contract with Parke-Davis that obliged Parke-Davis to furnish these services? A. I do not know. I don't recall any such contract. But I do know that these services were formerly furnished to us, and I know, of first-hand knowledge, that Parke-Davis did not continue the furnishing of these services.

Q. But there was no contract, to your knowledge, which required them to furnish those services? A. No, outside of my general thought as a businessman that Parke-Davis would provide the same treatment that they provided to anybody else, on an equitable basis, and not discriminate against us.

Q. Now, you have stated a new claim in this lawsuit, and that is that this conduct which you have described and which took place allegedly in the year 1957 was unlawful. Would you tell me on what basis you say that that was a violation of law? A. I am not a lawyer. I can only tell
28 you from a businessman's viewpoint. It is only my considered opinion that the normal procedure is that a firm such as Parke-Davis will afford the same treatment as to discounts, price discounts on merchandise, servicing, etc., to all their customers on an equal basis. The actual point of law I would leave to you and my counsel.

Q. Do you say that any of the conduct to which you have just

referred contributed to Parke-Davis' decision to cut you off in December 1957? A. I don't understand your question.

MR. CROWLEY: How does he know? He can't get inside their mind.

MR. OWEN: My question is as to the claim which he is making in this case.

BY MR. OWEN:

Q. My question was, do you claim that the conduct to which you have just referred and which you have just described in 1957 contributed in any way to the decision of Parke-Davis to cut you off in December 1957? A. I don't understand.

MR. CROWLEY: I object because he can't know what was in their mind. But you could ask him another way if you want.

29 BY MR. OWEN:

Q. Let me refer to the first set of answers to interrogatories which were filed in this case, and I would refer you specifically to page 2 of those answers, to the first full sentence on the page.

Did you subscribe your signature to that statement, Mr. Haft? A. What are you referring to, sir?

Q. The first full sentence on page 2. A. What word does it start with?

Q. Beginning with the words "After the defendant." And I will read the sentence aloud to you for the record:

"After the defendant had won the criminal case Dart was cut off, which plaintiffs assert was a direct result of testimony given by Mr. Haft at the criminal trial." A. Yes.

Q. You did subscribe to that? A. Yes.

Q. And you adhere to that statement? A. Yes.

Q. I take it, then, that it is your claim that, if you had not testified at the criminal trial, you would not have been cut off. A. Yes.

30 Q. Now, directing your attention to the year 1958, would you tell me, sir, whether you made any attempt to purchase any Parke-Davis products from Parke, Davis & Company? A. I do not recall specific years.

Q. Let me direct your attention to the period 1958 up until the filing of the complaint in this case, which was in January 1962, and ask you whether in that period -- that is, during the calendar years 1958, 1959, 1960, and 1961 -- Dart made any effort to purchase Parke, Davis & Company products from Parke, Davis & Company. A. Yes, we did.

Q. You did? A. Yes.

Q. And if you will direct your attention to the first such attempt, will you tell me when it took place? A. Unless you want me to refresh my memory, I do not know the specific date. I can tell you generally that we sent registered letters to Parke-Davis attempting to purchase their products.

Q. And you do not recall specifically when you did that? A. I could search my files and give you the dates.

Q. Do you recall how many such letters were written? A. I do
31 not know the exact number. I know that there have been more than one to the present date. The actual dates I do not know.

Q. And those letters were written by you, sir? A. They were written either by myself or at my direction by one of the officers of the firm. I don't recall specifically whether it was over my signature or under my direction with someone else's signature.

Q. Were all of these letters of similar content? A. Basically the same, yes.

Q. And what was the substance of those letters? A. The substance was that we would like to place an order, that we were enclosing an order, and, in order to avoid any discussion or leave any loophole on the part of Parke-Davis that might be due to credit reasons, we would be glad to send a certified check prior to receipt of shipment and that we were prepared to do business.

Q. Would you estimate the number of such letters that were mailed in this period? A. No. I would not know. I would not know.

Q. Now, I asked you earlier about whether or not any contract existed between Dart and Parke-Davis and would now ask you whether in December 1957 there was any contract in existence between Dart

32 and Parke-Davis which would require Parke-Davis to continue to sell to Dart. A. I do not know whether there is or isn't. In the normal course of business, if you are dealing with a manufacturer and you would have any type of franchise agreement or what have you, we would sign it routinely.

Q. It is true, is it not, that you have no knowledge of a contract of the kind I described? A. I do not know whether there is one or is not one. I'm not avoiding the subject. I can only say this, that we might have possibly signed some type of agreement with them. These things are done routinely with franchise accounts.

Q. Let me take it another way, Mr. Haft. A. I would suggest that you go to the Parke-Davis records. If one existed --

Q. Let me take it another way, Mr. Haft.

Do you claim that in December 1957 there was an obligation on Parke, Davis & Company to continue to sell its products to Dart? A. Yes.

Q. You do claim that there was such an obligation? A. Yes.

Q. And is your claim based upon a contractual obligation? A.

33 Contractual in the sense that a contract existed?

Q. Yes. A. I'm not a lawyer. You'll have to get that answer from my counsel.

MR. OWEN: Mr. Crowley, would you be willing to furnish a copy of any contract which might conceivably give a basis for the assertion here by Mr. Haft that Parke-Davis was obliged by contract to continue to sell to Dart?

THE WITNESS: That is not what I said. If the record states that, I think we should modify it. You asked me whether I believed that Parke-Davis was obliged to sell me, and I said yes.

MR. CROWLEY: This is right.

THE WITNESS: You asked if by contract, and I said not by contract. And then you asked me why I thought they were obliged to sell me.

BY MR. OWEN:

Q. On what basis do you say that Parke, Davis & Company was obliged to continue to sell to Dart? A. Because of the fact they had sold Dart, that they had stopped selling Dart because of a criminal and civil conspiracy, and that the basic doctrine, without going into law, is that their actions in selling my competitors and refusing to sell me
34 was causing us harm and that the basic doctrine of equitable treatment to equal parties should be followed.

Q. So that you do not base your claim of such an obligation on any contract between Parke, Davis & Company and Dart; is that correct?

MR. CROWLEY: Why don't you amend your question by saying "written contract"?

BY MR. OWEN:

Q. I take it, then, that you do not claim that the asserted obligation is based on any contract, either written or oral. A. You had better read that question to me again.

(Question read by reporter.)

THE WITNESS: You have two questions there. If you ask me one at a time, --

BY MR. OWEN:

Q. Let me try it again, Mr. Haft. A. Yes.

Q. You have stated that, in your view, Parke, Davis & Company had an obligation to continue to sell to Dart Drug Company in December 1957 and thereafter. A. Yes, yes. And let me finish answering.

I tell you as a businessman and on an equitable treatment basis
35 that they had and today have a continuing obligation to sell me.

Q. That is an opinion of law. A. This is my opinion as a businessman. And when you start going into contracts, whether it is oral or written, I'm not a lawyer and I'm not in a position to answer. I would say this becomes a matter of law which you lawyers should iron out. This is my answer.

Q. But I wish to repeat one phase of this question. When you

say that there was an obligation on the part of Parke-Davis to sell to Dart, you are not thinking in terms of an oral or written contract to sell to Dart; is that correct? A. I am thinking in terms of equitable treatment, equal treatment to competitors in the same field. What ramifications of contracts there are, whether there is an oral contract ramification there, I do not know as a lawyer. I can give you the facts and then let the lawyers come up with the ramifications thereof. I still cannot answer you about contracts -- period.

Q. Isn't it the fact, Mr. Haft -- A. You can ask me from now until tomorrow about contracts, and I am not qualified to answer you.

Q. Isn't it the fact --

MR. CROWLEY: Just one moment. I suggested earlier that if

36 you wanted the question answered to the ability of Mr. Haft, which would be within a factual framework, a statement of fact, you may ask him whether there was a written contract. I object to the question -- and I think that he has answered, anyway -- with reference to oral contracts, because this calls for a conclusion of law that I think is not within his capability. I just suggest on the record that this would be an acceptable procedure.

MR. OWEN: I take it Mr. Haft would be willing to answer the question you have suggested, and I will put it to him.

BY MR. OWEN:

Q. When you claim there was an obligation on the part of Parke, Davis & Company to sell to Dart, are you basing that claim on any oral contract between the parties?

MR. CROWLEY: I have objected to that. I think you are asking him to arrive at a conclusion which is a conclusion of law, and I am not sure he has the ability to arrive at such a conclusion.

37 BY MR. OWEN:

Q. You can attempt to answer the question, Mr. Haft. A. I am not going to attempt to answer a question which I do not know the definition of. I do not know the legal definition of oral contracts. I can only

say that Parke-Davis stopped selling me because of an illegal action on their part, and this becomes a question of law, which my counsel has specifically told me has been determined by the Supreme Court. This I can make as a legal statement. When you come to oral contracts, I cannot answer you, and you will have to go to the next question. This is it.

Q. Do you claim, Mr. Haft, that any oral conversation took place between you and Parke, Davis & Company under which Parke, Davis & Company became obliged to continue to sell to you in the year 1958 and thereafter? A. You are getting again into the boundary between my best opinion as a businessman and the legalities involved.

Q. My statement was perfectly factual. A. Just a minute. Let me answer.

Your statement could be factual, but you could ask me a question which I am not qualified to answer. I can only say that -- you had better repeat the original question. By this time I'm off the track.

38 MR. OWEN: Please read the question, Mr. Reporter.

(Pending question read by reporter.)

THE WITNESS: Yes.

BY MR. OWEN:

Q. When did that conversation take place, Mr. Haft? A. During the initiation of the conspiracy by Parke-Davis with the other retailers and the wholesalers.

Q. And with whom -- A. Just a minute. If you want me to answer, I can only answer if you give me time.

Q. Go ahead and answer the question, Mr. Haft. A. Fine.

And during the initiation of the Government investigation.

Q. And with whom did that conversation take place? A. With various Parke-Davis officials.

Q. Would you give me their names, please? A. I would have to refresh my memory by going back to the original records.

Q. Do you remember the Parke-Davis employees with whom you

had dealings in 1956? A. I can't remember their exact names. There was a salesman. I think has name was Tancredi. There was a branch manager named Ripps. There was an assistant branch manager. I think his name was Powers.

39 This is only hazy recollection.

There was a hospital representative. I don't recall his name.

Q. Do you claim that this conversation to which you have just testified took place with any of those gentlemen? A. The conversation is on the record. If I had agreed to raise my prices in the District of Columbia, they would have sold me. Since I didn't agree to raise my prices in the District of Columbia and since I had no power to stop the Government investigation of their conspiracy, since I had no power to stop the trial thereof, they punished me by refusing to sell me.

Therefore, my conclusion -- you asked me to draw a conclusion, and I respectfully ask you to let me finish my conclusion -- is that, since they stopped selling me based on an illegal action on their part, their action in refusing to sell me is illegal.

Does this answer your question, sir?

Q. Let me ask you another question, Mr. Haft, and I would like a yes or no answer to this.

You testified a moment ago to a conversation in which certain employees of Parke, Davis & Company undertook a commitment to sell to

40 you in the year 1958. Is that correct?

MR. CROWLEY: No.

THE WITNESS: No, I did not. I wish you would read the record.

MR. OWEN: It is not for you, Mr. Haft --

THE WITNESS: Just one minute.

MR. OWEN: It is not for you to ask to have it read back.

THE WITNESS: Just one minute. I'm going to take a break.

MR. CROWLEY: Take a break.

(Thereupon, there was a short recess.)

BY MR. OWEN:

Q. Now, I will take these questions as slowly and simply as I can so we don't have any confusion about it. A. Fine.

Q. I understood you to say that at some point in time -- and I have not yet found out when -- at some point in time a conversation took place between you and certain Parke, Davis & Company employees which gave rise to an oral obligation for Parke-Davis to sell you in 1958 and later years. Am I correct in that? A. You are incorrect.

Q. Have you ever had a conversation with Parke-Davis employees in which they made a promise to you to sell in the year 1958 or later
41 years? A. The answer is no.

Q. And I take it, Mr. Haft, that there has never been any written promise to sell to you in 1958 or later years. A. No.

Q. Have you ever had any communications with Parke, Davis & Company with respect to the possibility of reinstatement, apart from the letters which you wrote to Parke-Davis asking that they fill orders? A. Yes.

Q. And what was that communication? A. An answer in a lawsuit, the lawsuit in Maryland in reference to fair trade, in which we requested them to sell us. This was done officially. What legal documents were involved or letters I do not know. The lawyers handled it.

Q. Were you a party to those communications? A. I don't know what you mean by "party." I made the decision that such action should be taken. Yes.

Q. Let me just see if I understand you.

You made a decision to seek reinstatement? A. We always sought reinstatement. We have continuously tried to get reinstatement.

Q. But in the Maryland situation, after you had made the decision,
42 you instructed others to ask for reinstatement? A. Yes.

Q. But you did not make the request yourself? A. It was made in my name. I'm not a lawyer.

Q. But you were not present at the time that request was made? A. Oh, yes.

Q. You were? A. Yes.

Q. Was that in court? A. Now, this is my recollection. It was both in court, in the court record of the Maryland fair-trade action, and also by -- and I'm only using the legal word that I think is correct -- by a motion, request of the court to ask Parke-Davis to reinstate us.

Q. So that these negotiations, if you will, were in a judicial proceeding? A. Yes. It would be judicial.

Q. Apart from the judicial proceeding in Maryland, have you ever communicated with Parke-Davis about the possibility of reinstatement? And again I am excluding the letters to which you referred earlier. A. Yes. In the fair-trade suit the official of Parke-Davis
43 whom I met in the hallway -- we still maintained a cordial relationship as far as conversing with each other was concerned. We were both in the same trade. I asked him -- I told him we would be delighted to deal with Parke-Davis. In fact, we solicited dealing with them.

Q. And who was this individual? A. I do not recall. If you will check that fair-trade record and find out who testified at that time on behalf of Parke-Davis, you will find his name.

Q. And what did he say to you after you had mentioned this subject? A. He said he would bring it to the home office, but it wasn't his decision to make. They were referring all these decisions to upstairs and the attorneys.

Q. Did you ever hear any result from that? A. No. Never heard from him again.

Q. You never heard from either the individual or the company on that subject? A. No.

Q. Now, leaving to one side the statements which were made in connection with the Maryland case and the letters which you have said you sent periodically to Parke-Davis, have you ever had any other communication with anyone in Parke-Davis as to the possibility of re-
44 instatement? A. Yes.

Q. With whom was that communication? A. With the salesmen

on the various territories of the stores that we purchased that had had Parke-Davis accounts and who refused to come and continue selling those stores the minute that we purchased the stores.

Q. How did those communications take place -- by telephone? A. By telephone.

Q. Would you call the Parke-Davis people and raise the subject, or did they telephone you? A. No. Either myself or members of my organization would call and they would just refuse to sell us.

Q. In any of the communications which you have had with Parke-Davis on this subject, has any representative of Parke-Davis ever indicated to you the conditions under which Parke-Davis might be willing to reinstate your account? A. They told us they were under instructions not to even talk to us, that they just couldn't discuss it with us.

Q. So that no representative of Parke-Davis has ever told you that the company would be willing to reinstate you under specified conditions? A. It wasn't a question of reinstating us in the instance you are
45 referring to, if you are referring to the stores we purchased. It was a question of the same store that was owned by individual A, which qualified as a franchise dealer, suddenly no longer being sold the minute that it became a Dart operation.

Q. Let me see if I can put the question a little more clearly.

I take it that you have never had a communication from a representative of Parke-Davis saying, in effect, that the company will reinstate Dart if Dart meets certain conditions. A. No.

Q. And I take it, by the same token, you have never had any promise that Parke-Davis would reinstate you under certain conditions. A. No.

MR. OWEN: I have no further questions, Mr. Crowley.

MR. CROWLEY: There will be no cross examination.

[Filed June 9, 1963]

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. All of the facts in this case have been established by a lengthy record which includes all of the following:

(1) The record in United States v. Parke, Davis & Co., Criminal No. 444-57.

(2) The record in United States v. Parke, Davis & Co., Civil No. 1064-57. (The Final Judgment of which is attached hereto as Exhibit A.)

(3) The complaint in this case;

(4) The plaintiffs' answers and additional answers to defendant's interrogatories in this case;

(5) The deposition of Herbert H. Haft, dated February 19, 1963;

(6) The Judgment of the United States Supreme Court in United States v. Parke, Davis & Co., 362 U.S. 29 (1960);

(7) The Judgment of the United States Supreme Court in 365 U.S. 125 (1961);

(8) Affidavit of Haft.

2. The material facts are stated chronologically as follows:

(1) April 6, 1954 to July, 1956

Plaintiffs, under a former corporate name, Dart Drug Corporation, were able to make direct purchases of Parke-Davis products as distinguished from purchasing such products from wholesalers. They did both but were able to enjoy considerable savings in their direct purchases from Parke-Davis.

(2) First one-half of 1956- Paragraph II- Final Judgment of U. S. District Court in CA 1064-57 - April 19, 1961.

"For a short time prior to the summer of 1956, there had been price cutting by certain retailers in the District of Columbia. Parke-Davis

and its wholesalers continued to sell to these retailers until deep price cutting by retailer Dart Drug Company caused the Baltimore branch manager to inquire as to a possible remedy at a branch manager's meeting in Detroit. At that meeting he learned that the company took the position that in a non-fair trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of Parke-Davis. The manager of the Baltimore branch office returned after this meeting and instructed his assistants and the company salesmen to inform the trade in the District of Columbia and Virginia that Parke-Davis would not sell to any retailer who sold its products below suggested minimum prices, and would not sell to any wholesaler who, in turn, sold those products to such a retailer. Parke-Davis sought to enter into agreements with the wholesalers and retailers to maintain its suggested resale prices and instructed and authorized its representatives to seek such agreements. These instructions were carried out in July 1956."

(3) On or about July 3, 1956

Parke-Davis employees visited Dart and other retailers and asked them to stop advertising and selling Parke-Davis products at discounts. Parke-Davis employees told plaintiffs and other retailers that if they didn't stop advertising and selling Parke-Davis products at discount that Parke-Davis would refuse to sell them directly and would cause the wholesalers not to sell to them.

(4) July 3, 1956 through August, 1956 and continuing to the present time

The defendant and certain wholesaler and retailer co-conspirators entered into and engaged in an unlawful combination and conspiracy to establish, maintain, enhance, and fix the wholesale and retail prices on pharmaceutical products manufactured by the defendant in unreasonable restraint of trade. The results of such unlawful combination and conspiracy continue to this day.

In the furtherance of such unlawful combination and conspiracy to restrain trade, the defendant through its officers and employees visited the plaintiffs and certain other retailers and told them that they must agree not to advertise and sell the defendant's products at discount prices or that the defendant would not sell them directly and would prevent drug wholesalers from selling to them. Defendant visited certain drug wholesalers and asked them to agree not to sell to retailers who sold at discount and advised them that if they did sell to retailers, including the plaintiffs, who sold at discount, that the defendant would not sell to such wholesalers. The wholesalers did agree not to sell to any such discounting retailers and, in fact, did not sell to them during the period of July and August, 1956.

During the same period the defendant obtained agreements among the certain drug retailers that none of them would advertise defendant's products in newspapers or in their respective store windows at discount prices as long as all other retailers refrained from such practices.

(5) Late August and early September, 1956

The above stated agreement among retailers was effective for a short time but some began advertising. The Department of Justice began an investigation of a possible antitrust violation by defendant upon the complaint of the plaintiffs. The existence of the investigation became known to the defendant. The defendant resumed sales directly to the plaintiffs and other retailers and allowed the wholesalers to make sales to the plaintiffs and the other retailers.

(6) May 2, 1957

Criminal No. 444-57 was filed by the United States v. Parke, Davis & Co.

(7) May 2, 1957

Civil Action No. 1064-57, United States v. Parke, Davis & Co. was filed. (A transcript of this record was prepared for the Supreme Court.)

(8) October 29 to November 4, 1957

Criminal No. 444-57, United States v. Parke, Davis & Co., was tried and after the Government's case was presented, a judgment of acquittal was entered. No Parke, Davis & Co. employees appeared as witnesses at the trial.

(9) December 12, 1957

Parke, Davis & Co. addressed a letter to the plaintiffs announcing that the defendant would no longer sell directly to the plaintiffs. This action is known as the 1957 cut-off and persists to this date. Although plaintiffs have requested to be allowed to buy direct from defendant by letter on several occasions and verbally on several occasions and in the course of fair trade litigation in Maryland, it is still unable to buy directly from the defendant. Plaintiffs have offered to pay in cash all to no avail.

(10) June 24 to July 16, 1958

Trial of Civil Action No. 1064-57 resulting in judgment of dismissal in favor of defendant, Parke, Davis & Co.

(11) September 11, 1958

Notice of Appeal by plaintiffs to the Supreme Court in the matter which ultimately became know as United States v. Parke, Davis & Co., 362 U. S. 29 (1960).

(12) February 29, 1960

Opinion of the Supreme Court reversing the District Court in Civil Action No. 1064-57, and remanding "with directions to enter appropriate judgment enjoining Parke-Davis from further violations of the Sherman Act unless the company elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record."

(13) July 18, 1960

Findings of Fact and Opinion of District Court in Civil Action 1064-57 upon remand. The defendant presented one witness and the Court found

that the illegal practices had ceased prior to filing suit by the Government, the Court did not issue an injunction and did not enter an adjudication that Parke-Davis had violated the law.

(14) January 23, 1961

The Government having once again appealed to the Supreme Court that Court on this date gave its per curiam decision as follows: (365 U.S. 125)

"When this case was last here we held that the Government's proofs were sufficient to show that Parke-Davis violated the Sherman Act. However, in reversing the District Court's judgment we remanded the case with direction to afford Parke-Davis a further opportunity to submit evidence in defense in order to refute the Government's right to injunctive relief. United States v. Parke, Davis & Co., 362 U.S. 29, 49.

On remand, Parke-Davis introduced evidence not to rebut the Government's proof as to violation but only to show that it had abandoned its illegal sales policy, and that therefore an injunction, being unnecessary, should not issue. On that record the District Court entered an order denying not only the injunctive relief sought by the Government, but also an adjudication that Parke-Davis had violated the law. The present appeal is not from the provision which denies injunctive relief, but from the omission of a provision adjudging that Parke-Davis violated the Act. We have examined the record as supplemented on the remand and hold that under our prior order the Government is entitled to a judgment on the merits, as prayed in paragraph 1 of the section of the Complaint captioned "Prayer." We also hold that the District Court should retain the case on the docket for future action in the event the Government applies for further relief from an alleged resumption by Parke-Davis of illegal activity. The order of the District Court filed July 18, 1960, is therefore vacated and the case is remanded to the District Court with direction to enter judgment accordingly."

(15) February, 1961 (One month after the last Supreme Court opinion)

Parke-Davis instituted its distribution change whereby it sells its goods in large package sizes to direct buyers and sells its goods in smaller package sizes through wholesalers. The result is that the plaintiffs and any other retailer who cannot buy direct must pay higher prices than those who can buy direct. Not only are the plaintiffs injured but all non-direct buying retailers are thus penalized in price.

(16) Week of April 18, 1962, at annual meeting of Parke, Davis & Co. (after this suit was filed on January 11, 1962.)

Defendant announced publicly that it will sell direct to any retailer but upon request it persists in its refusal to sell directly to the plaintiffs.

Respectfully submitted,

/s/ Frederick T. M. Crowley
Attorney for Plaintiffs

* * *

[Filed June 19, 1963]

AFFIDAVIT OF HERBERT H. HAFT

District of Columbia, ss:

Before me, a notary public in and for the said District of Columbia, personally appeared Herbert H. Haft, who, being first duly sworn, on oath deposes and says:

1. That he is President of all of the plaintiff corporations; that he is the founder of Dart Drug Corporation and the other plaintiff corporations; that he is the person who was the president and managing director of Dart in 1956; that he was the person who filed the antitrust complaint with the Department of Justice in 1956, and that he was the complaining witness and the Government's witness in Criminal No. 444-57 and Civil No. 1064-57, and that he has continuously been president and managing director of plaintiff corporations as they severally came into being from time to time since 1954.

2. That he stated in his deposition of February 19, 1963 (Haft Dep., p. 5) that he didn't think he had heard the testimony of any Parke-Davis employees at the criminal trial, (Cr.No.444-57) and that it has been many years since the criminal and civil trials; that he was not shown the transcript of the criminal, and that he must have been confused at the time of the deposition.

3. That as a result of the 1957 cut-off and the 1961 distribution change, Dart cannot buy a sufficient volume of Parke-Davis products to satisfy its demand, because wholesalers do not carry a sufficient supply.

4. That as recently as March 1, 1962, Parke-Davis' price list contained the same retail price policy which was in effect in 1956.

5. That according to a statement published in Drug News, April 25, 1962, at pages 1 and 8, that at its annual meeting in the week of April 18, 1962, Parke-Davis announced the relaxing of its distribution policy and that from then on it would sell directly to anyone licensed to

sell pharmaceuticals, even if the customer sold at discount prices.

6. That Dart has requested Parke-Davis orally and in writing to be allowed to buy directly from Parke-Davis. The most recent such request in writing was made in February, 1963, however, Parke-Davis refuses to sell to Dart thus continuing the 1957 cut-off to this day. Since 1956 Dart has grown rapidly from three retail stores to sixteen retail stores. Some of these stores are stores which had been in operation under other ownership and which as such were able to buy directly from Parke-Davis, however, as soon as Dart acquired these stores, and they became Dart outlets, Parke-Davis refused to sell them directly. Dart has even offered means of guaranteeing payment but Parke-Davis still refused to sell.

/s/
Herbert H. Haft

Subscribed and sworn to before me this day of June, 1963.

Notary Public, D. C.

TRANSCRIPT OF PROCEEDINGS ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

1 Washington, D.C.
September 27, 1963

The above cause came on for hearing of motions before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

APPEARANCES:

For the Plaintiffs:

FREDERICK T.M. CROWLEY, ESQ.

For the Defendant:

ROBERTS B. OWEN, ESQ.

2 THE DEPUTY CLERK: Dart Drug Corporation vs. Parke, Davis & Company.

MR. OWEN: Good morning, Your Honor. My name is Owen. I represent the defendant in this case.

You may recall my opening remarks yesterday afternoon.

THE COURT: Suppose you open up again.

MR. OWEN: Splendid. The case is an antitrust case, a treble damage action brought by a retail drug chain against the manufacturer of pharmaceutical products. I represent the defendant manufacturer. The case is before Your Honor on cross motions for summary judgment, and as I think I told Your Honor yesterday, I think Mr. Crowley and I are in agreement that the facts themselves are not in dispute. There is a pure question of law before Your Honor today, and that question, very briefly, is whether --

THE COURT: You represent the defendant?

MR. OWEN: I represent the defendant, Your Honor. That question is whether the defendant's refusal to have further business dealings with the plaintiff in December, 1957, constituted a violation of Section 1 of the Sherman Act.

Now, as I have said, although the facts are not in dispute, they are a little complicated, particularly in terms of sequence, and I have

3 taken the liberty of drawing up a chronology, simply a list of the

events in chronological order, trying to keep the chronology as simple as I can, and I think it will make it easier for the Court and for counsel in today's proceedings if Your Honor would accept a copy of this chronology and follow it as I --

THE COURT: I shall be very glad to have it. I am sure it will be very helpful.

(Mr. Owen handed the document to the Court and a copy to plaintiff's counsel.)

MR. OWEN: Starting, Your Honor, if I may, with the first item on the list, it is one of the two basic events in the case. In July and August of 1956 Parke, Davis & Company, which was at that time selling its products in two ways -- it was selling both directly to retail drug stores in the District of Columbia; it was also selling to wholesalers, who in turn resold Parke Davis' products to retailers -- Parke Davis discovered in July of 1956 that a great many retail drug stores in this area were selling its products at discount prices, that is, below the suggested minimum retail prices of the manufacturer. Parke Davis quite frankly, Your Honor, didn't like it.

THE COURT: No manufacturer, no wholesaler, likes it, but they have to put up with it very often.

4 MR. OWEN: Indeed they do, increasingly often, Your Honor.

In this case we decided we would try and do something about it. The company consulted their house counsel and their house counsel said the thing to do is to go to the retailers and say we won't sell to you if you discount and go to the wholesalers and say if you sell to retailers who are discounting we won't sell to you.

Ultimately -- I will not bother Your Honor with the vast details of what happened in July and August, I will simply say this: ultimately the Supreme Court held that that conduct on the part of Parke Davis & Company had constituted a combination with the wholesalers in restraint of trade and a violation of Section 1 of the Sherman Act. I make no bones about it, we violated Section 1 of the Sherman Act by concerted action with the wholesalers in two months of 1956.

Now the two sailient facts that I would like the Court to bear in mind is the nature of the violation, it was concerted action, and secondly the length of time involved, this conduct lasted during the two months of July and August in the summer of 1956.

Now looking at the second item on the chronology, from August, 1956, to date Parke Davis has regularly and continuously sold its products both directly to retailers who are discounting its products and to

5 wholesalers who in turn resell to retailers. Discounting has been going on in this area, Your Honor, perfectly continuously since August of 1956.

THE COURT: I think as a member of the public I can say that is a matter of common knowledge. There are several drug stores, several chains of drug stores that people patronize just because they charge less than other drug stores.

MR. OWEN: Quite so, Your Honor, and we have done absolutely nothing to try and prevent that because we found we won't be able to sell a product if we try and prevent it.

THE COURT: And there are no so-called fair trade laws in the District of Columbia.

MR. OWEN: Quite right, Your Honor.

THE COURT: As there are in some states.

MR. OWEN: Now, in May of 1957, Your Honor, the next event on the list, the United States brought two actions against Parke, Davis & Company, a criminal action and a civil action, charging that in involving the wholesalers in our effort to stop discounting in the summer of 1956 we had created a combination in restraint of trade.

Now, the criminal case came on first. It was tried before Judge Tamm and it was his conclusion of law, Your Honor, at the end of the Government's evidence, that the conduct had not as a matter of law constituted a violation of Section 1. He did not see a combination. That

6 was the end of the criminal case, obviously, because he entered a judgment of acquittal.

Then the civil case came on for trial and at the end of the civil case this Court took the same view, that is, that the conduct did not constitute a violation of Section 1.

Now, immediately -- well, not immediately. More than a month after the termination of the criminal case, Your Honor, Parke, Davis & Company decided, completely on its own and independently, that it did not wish to have further dealings with the Dart Drug chain. I will tell you the reason for that, although I think the reason is irrelevant, as I will argue to Your Honor in a moment. The reason for that was, frankly, that we had come to question the integrity of that organization and we simply didn't want to have to do business with them. So on December 12 -- and this is the critical event in the case -- on December 12, 1957 we wrote them a letter and said we don't want to do any further business with you and we are closing your account permanently effective immediately.

Now, it is that refusal to sell on December 12, 1957, more than -- well, almost a year and a half after the events of the summer of 1956, that is the critical event in the case. But in order for Your Honor to understand the position of both parties I have to continue the story a little bit further.

THE COURT: You say the Supreme Court decided that previously the activities of Parke Davis were in violation of the Sherman Act. What is the citation to that?

MR. OWEN: 362 U.S. 29, Your Honor, and that was on the appeal from this Court's dismissal of the complaint in the Government's civil case. Now, the case did go to the Supreme Court and they held as Your Honor has indicated.

THE COURT: Perhaps I am anticipating something. After this letter of December 12, 1957 did wholesalers still sell Parke Davis products to the plaintiff?

MR. OWEN: I am glad you brought that out, Your Honor. You are quite right, they did. We continued to sell to all retailers and to wholesalers. The wholesalers continued to sell to Dart. The only

change in December of 1957 was that we didn't sell them direct. And they continued to buy our products from wholesalers, they continued to discount our products.

THE COURT: In other words, they had to pay a little higher price because they had to pay the wholesaler's mark-up, is that it?

MR. OWEN: Precisely so, Your Honor.

THE COURT: Is that what is really involved here?

8 MR. OWEN: That is what is really involved. This case is for damages for the additional amount, so to speak, that they had to pay because they were dealing through the wholesalers instead of buying direct. In other words, this case is for damages starting December 12, 1957 and going on.

They also complain that they can't get our products in sufficient volume and so on, but the whole case is the loss to their business as of December 12, 1957 and thereafter.

Now I want to point out one or two things that happened after that. Let me say first that when this Court had the Government's civil case before it for the first time it made a finding. That finding is quoted in item 6 of my chronology and the finding says: "Parke Davis' action in ceasing relations with Dart" -- this is in December of 1957 -- "was a purely unilateral one and there is no evidence that it had any relation to Dart's prices or advertising policies."

THE COURT: What Judge decided that?

MR. OWEN: That was Judge Jackson, Your Honor.

Now, when the Government took the case to the Supreme Court there were two things about its position that Your Honor should have in mind. They did not challenge that finding at all.

THE COURT: But this is the case where the Supreme Court reversed?

9 MR. OWEN: Quite so, Your Honor, but that finding was not challenged and the legality of our 1957 conduct was not challenged. The only thing that was challenged in the Supreme Court was our 1956 conduct, which was concerted action. And the Supreme Court did not say that our

1957 conduct was illegal, although they were aware of it, and they did not reverse the finding that I have just referred to.

Now, the Supreme Court, Your Honor, then sent the case back to this Court for evidence on the question of whether injunctive relief should issue, and of course Your Honor will realize that the test of whether injunctive relief is appropriate in the circumstances is whether the conduct has been continuous and whether there is any possibility that it will continue in the future. The Court took evidence on that issue and in July of 1960 it made a series of findings which are extremely important in this case and they are appended, if Your Honor please, to my supplementary memorandum which both supports my own motion and replies to his motion. These are July 18, 1960. It should be the last document filed in the case.

THE COURT: Yes, it is here.

MR. OWEN: Your Honor, I might just summarize what these say. They are a little long, but they say, first of all, that when we acted in 1956 we were acting in the belief that the conduct was lawful. It turns out we were wrong, but we thought it was lawful.

THE COURT: Suppose you call my attention to the pertinent finding.

MR. OWEN: The most pertinent finding, Your Honor, the critical finding is Finding No. 7, which appears, at least in my copy, on page 3.

THE COURT: Yes, I see it here.

MR. OWEN: At no time since January 1957, either before, or after the decisions of this Court in companion Criminal Action No. 44-57 and this case, has Parke Davis considered or taken any action to re-establish the sales policy hereinbefore described or to discourage, by refusals to sell or otherwise, the retail sale or advertisement of Parke Davis products at less than suggested minimum retail prices in non fair trade areas.

Now I will not burden Your Honor with the other findings, but the sum and substance of these findings is this: that we did engage in an

effort to stop discounting in July and August of 1956, but only in those two months; that we then permanently discontinued that practice for business reasons because competitively we couldn't sell our products if we tried to stop discounting; and that the violation, therefore, is confined, as I have pointed out to Your Honor a little repetitively, to

11 simply two months of 1956.

THE COURT: What point are you trying to make, Mr. Owen?

MR. OWEN: I am trying to make this point, Your Honor: that when we cut off Dart in December of 1957, a year and a half after the events of 1956, we were acting completely unilaterally and independently and not in combination with anyone. And by definition, you can't have a violation of Section 1 of the Sherman Act without a combination or concerted action or something of that kind. There is a long line of cases, as Your Honor is well aware, that holds consistently, starting in 1919 with the Colgate case and running right down to July and August of this year --

THE COURT: I have sometimes wondered how much has been left of the Colgate case as a result of subsequent decisions.

MR. OWEN: Let me say this about that, Your Honor. The Courts are now relatively ready, if I may put it this way, to find a combination if the manufacturer involves anybody else. But where you have a pure unilateral independent decision to refuse to sell, without anybody else involved, by definition, of course, you can't have a violation of Section 1.

Now, Your Honor is obviously aware of these cases, I don't think I need to quote them, they simply say that a manufacturer has the right

12 to sell to anybody he pleases so long as he exercises his own independent judgment on that score.

THE COURT: I am aware of these cases, but I haven't the name and the citation to each case in mind.

MR. OWEN: Let me discuss them for a moment, if I may. The first and great case is United States against Colgate & Co., 250 U.S. 300. Now, that case is just our case right here. In that case a manufacturer didn't like his customer discounting his products and he

refused to deal with him, and the customer brought suit alleging a violation of Section 1 of the Sherman Act. The District Court dismissed. The Supreme Court affirmed, and let me just read one brief passage from their opinion:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which would restrain trade. In the absence of any purpose to create or maintain a monopoly the Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal."

And then they quote another case, the Trans-Missouri case.

> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

Now, that case has been reaffirmed in the very case upon which the plaintiff primarily relies in this case, namely, the Supreme Court's decision in Parke Davis.

I have given you, I think, the citation to the Parke Davis case itself, but let me make two comments about that Supreme Court opinion. First, they said, in effect, it is still the law, it is still the law under Colgate, and I quote, "that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act." And they went on to say, Your Honor, that if we had simply refused to deal either with the retailers or with the wholesalers, without enlisting the cooperation of the wholesalers, there wouldn't have been a combination and there couldn't have been a violation.

Now I might cite a very recent case, Your Honor, called R.S. Supply Corp. against Ruberoid, which was decided in July of this year by a District Court, and let me just read the passage --

THE COURT: What District Court?

MR. OWEN: District Court in Connecticut, Your Honor.

THE COURT: And who is the Judge?

14 MR. OWEN: I am sorry to say, Your Honor, I don't know.

THE COURT: It is always helpful to have the name of the Judge.

MR. OWEN: I'm sorry, I don't have his name.

Let me read a little bit of his language. It's our case. The complaint was dismissed. He said:

> "The mere refusal to sell on the part of a manufacturer, when such refusal is the result of his independent discretion as to the parties with whom he will deal, is not within the purview of the antitrust laws."

And he cites United States against Parke, Davis & Company.

> "A unilateral refusal to sell becomes illegal only where a monopoly exists. One engaged in private enterprise may select his own customers and, in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause or for no cause whatever."

Now I am reaching the conclusion of my argument, Your Honor, and I want to point out what the plaintiff's answer to my position seems to be.

THE COURT: Well, I wonder if it isn't better for the plaintiff to state his own position in his own way and then you can reply.

15 MR. OWEN: I accept your suggestion, Your Honor. Let me just say this: that he points or he takes the position that our motive, our motive in December 1957 was to prevent Dart from selling our products at discount. Now, that is not the fact, Your Honor, but for the purposes of this motion I concede --

THE COURT: If there is a dispute about that and if the issue is material I have to set the case for trial.

MR. OWEN: Quite right, Your Honor, and I don't dispute it. I am going to accept his allegation, I am going to accept his allegation as to our motive in 1957. But the reasoning runs that because our motive in 1957 was the same as our motive in 1956 -- and I will concede that the motive was the same both times, if he will have me do so -- he says

therefore we may regard the unilateral conduct of December 1957 as a continuation, as a part of the illegal concerted action of 1956. But what he fails to do is distinguish between concerted action, which does violate Section 1 of the Sherman Act by definition, from unilateral action, completely independent action, which by definition cannot violate Section 1 of the Sherman Act.

So that, if Your Honor please, there isn't any way to connect the two events. The act of December 1957 was a completely unilateral

16 lawful refusal to deal.

THE COURT: Does the question then come down to this: if the motive of the subsequent unilateral action is the same as the motive of the prior concerted action, that thereby the subsequent unilateral action is tainted by reason of the prior conduct?

MR. OWEN: That seems to be the position, Your Honor.

THE COURT: Is that the question?

MR. OWEN: I think that is his position and I think you have the issue, Your Honor. You are quite right, I think that probably summarizes the issue here, and I say, of course, it isn't tainted because we can cut him off for any reason. We can cut him off if his credit isn't good or because he has red hair or because we don't like his face or because he discounts our products. The motive as a matter of law is absolutely immaterial and the cases are crystal clear on that point.

THE COURT: Have you any other cases that apply the Colgate doctrine in the manner in which you contend?

MR. OWEN: In the manner in which I contend? I don't offhand, Your Honor, but the Parke Davis decision itself, the Supreme Court decision in Parke Davis says, as I have quoted to you, a simple refusal-- well, let me get it again because this is the critical -- the Court said:

17 "It is still the law under Colgate that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act."

They very carefully held that Colgate doctrine firm. They were ready to find a combination with the wholesalers and they did find it and they said that was illegal, but they very carefully said if you act unilaterally and completely alone without concert of action you can't violate the Sherman Act because the Act reads only a combination of people.

Now, if this plaintiff were alleging that in December of 1957 there was a combination with the wholesalers and that we held a meeting of wholesalers and said we think we are going to cut off Dart, how about it? And everybody said that is fine, then you would have a combination. But he doesn't allege that.

THE COURT: Well, let me ask you this. Does this action for triple damages include the conduct that occurred in 1956?

MR. OWEN: It does not, Your Honor. His damages are started with our refusal to deal at the end of 1957, a year and a half later. He makes no claim for anything we did during 1956.

THE COURT: Probably the statute of limitations has run. Perhaps that is the reason he starts in 1957.

MR. OWEN: I don't know what his motive was in framing his pleadings in that fashion.

THE COURT: I see. Well, was the plaintiff in this case affected by the combination in the Parke Davis --

MR. OWEN: He was indeed, Your Honor. We cut off a number of discounting retailers, very briefly, in July and August of 1956.

THE COURT: Actually, I don't know of any drug store in this city that sells any of these name products at the manufacturer's list price.

MR. OWEN: Nor do I.

THE COURT: Even the Peoples Drug Store, which is a highly regarded and a very ethical group of stores, sells at less than list prices. Dart and Standard and some others sell at still lower than Peoples. But Peoples, I think, if I am not mistaken, sells at less than the manufacturer's list prices.

MR. OWEN: You are absolutely correct, Your Honor. You can look in the Washington Post, I think it's any Friday, and practically all these big drug chains will be advertising everybody's products, including ours, at way under the manufacturer's list price. As a consumer I must say I am delighted with that situation.

I think Your Honor understands my position. I would like to save
19 whatever time I have for rebuttal, if I may.

THE COURT: Yes, you can take whatever time you need.

MR. OWEN: Thank you very much, Your Honor.

THE COURT: In this Court, as you know, we don't impose time limits. The only time limit is that counsel must stop when he ceases making contribution.

MR. CROWLEY: Good morning, Your Honor. My name is Frederick Crowley. I am attorney for Dart Drug Company.

Your Honor, Mr. Owen has stated somewhat the chronology of events, but I would like to add to that chronology since I do not believe that it has been fully set forth.

Now, first of all, I would direct the Court's attention to the final judgment issued by the District Court after there had been two appeals to the Supreme Court in this case and it had been remanded. The final judgment was issued. Paragraph Roman numeral II of that final judgment stated that for a short time prior to the summer of 1956 there had been price cutting by certain retailers in the District of Columbia, Parke Davis and its wholesalers continued to sell to these retailers until deep price cutting by retailer Dart Drug Company caused --

THE COURT: What is your point? You know, it is always easier for a Judge to follow an argument if he is first apprised of what counsel is trying to demonstrate.

20 MR. CROWLEY: Deep discounting by the Dart Drug Company caused the Baltimore branch manager to seek a remedy for that deep discounting by Dart Drug. This is a theme.

THE COURT: Whose Baltimore branch manager?

MR. CROWLEY: Parke Davis' Baltimore branch manager.

THE COURT: But what point are you trying to make?

MR. CROWLEY: I am trying to make this point, Your Honor: all events that have transpired since June 1956 have been aimed at a remedy for the deep discounting of Dart Drug Company. This is the theme that runs throughout this case.

THE COURT: There is no use getting too concerned. I just asked you a simple question.

MR. CROWLEY: Very well, Your Honor.

THE COURT: I think, from what I gather, Mr. Owen would admit that. Mr. Owen's position is that unilateral refusal to sell, no matter how arbitrary or damaging or disagreeable, is not within the Sherman Act. Now isn't that the point you have to meet?

MR. CROWLEY: This is the issue in this case and my theory or my issue is that the 1957 cut-off, which we have characterized the action of December 12, 1957, and a subsequent act known as the 1961 distribution change, where Parke Davis allows its wholesalers to sell smaller size packages to retailers and only those retailers who can buy directly from Parke Davis can buy the larger size packages; so that in addition to the 1957 cut-off, whereby Dart cannot buy direct and thereby costing more, it is now even more complicated since the 1961 distribution change.

THE COURT: What is the change in 1961?

MR. CROWLEY: In 1961 Parke Davis & Company announced that it would sell through its wholesalers to retailers only in what they call the smaller size packages, that any retailer who could buy directly from Parke Davis could buy the larger size packages, which are more economic to buy. This affected --

THE COURT: You mean that Parke Davis did not sell the larger size packages direct to retailers?

MR. CROWLEY: It would not sell the larger size packages direct to retailers.

THE COURT: Only through wholesalers, or is it the reverse?

MR. CROWLEY: Just a moment.

THE COURT: Tell me that again.

MR. CROWLEY: The 1961 distribution change meant that Parke Davis would sell its smaller size packages through wholesalers to retailers. Any retailer who could buy directly from Parke Davis could buy the larger size packages.

THE COURT: So that a retailer who could not buy direct from Parke Davis could only sell the smaller size packages, is that correct?

22 MR. CROWLEY: This is correct, Your Honor.

THE COURT: And that is the situation now?

MR. CROWLEY: That situation continues, yes. That is the situation today.

THE COURT: In other words, I could not go into one of Dart Drug Stores today and buy a large size package or a bottle of some commodity that is manufactured by Parke Davis, is that is, I could only buy small sizes?

MR. CROWLEY: Yes, you could buy the individual bottle, but the package that it comes in through the retailer would be in such fashion that it is a smaller size package.

THE COURT: You mean the entire shipment?

MR. CROWLEY: Yes. This is the distribution.

THE COURT: I thought you meant the larger size individual items.

MR. CROWLEY: No, I am talking in terms of the packaging, the distribution of the Parke Davis products.

You see, Parke Davis, Your Honor, competes with its wholesalers on equal -- not on equal terms, but --

THE COURT: You mean Parke Davis as a manufacturer competes with its own distributors?

MR. CROWLEY: Yes, Parke Davis competes directly with its own wholesalers, and by refusing to allow Dart and any other retailer to buy

23 directly from Parke Davis, this is a penalty, an economic penalty to Dart in that it cannot get the price, the wholesale price, and thereby it cannot discount its products as deeply.

THE COURT: Well, I suppose it would have to pay a mark-up anyway, the wholesaler's mark-up, as Mr. Owen concedes.

MR. CROWLEY: Yes, that is right. So this makes it more expensive for Dart to engage in business of Parke Davis products.

THE COURT: But do you agree with Mr. Owen that there is only a question of law involved? The way you are presenting this case there may be a question of fact. Mr. Owen presents it as a question of law. Now do you agree with Mr. Owen that it is only a question of law?

MR. CROWLEY: Yes, I do, Your Honor.

THE COURT: Then what is the question of law according to your view?

You know, when counsel takes the position there is only a question of law involved, you have got to be able to state that question succinctly and briefly and you have to crystallize it.

Now what is the question of law?

MR. CROWLEY: The question is that the 1957 cut-off and the 1961 distribution change were the proximate result of the illegal violations of the Sherman Act in 1956.

24 THE COURT: Well, that is a question of fact.

MR. CROWLEY: And these naturally flow. And I am prepared to demonstrate that this is a question of law.

THE COURT: Then what is the question of law? You have to state it as a question of law, Mr. Crowley.

MR. CROWLEY: That the violation of the Sherman Act -- that this '57 cut-off is a direct result of the 1956 violation of the Sherman Act; it continued, the thread flows.

THE COURT: That is a question of fact. If something you say is a direct result of something else, that is a factual question, isn't it?

MR. CROWLEY: But the facts have already been established in this record, Your Honor. The record has already established these facts. The Supreme Court's opinion and the final judgment of the District Court and the --

THE COURT: Well, proceed in your own way. You say the facts have been established. Very well, is there any finding of fact that the 1957 cut-off letter is the direct result of the 1956 conduct?

MR. CROWLEY: No, there is not.

THE COURT: You say the facts have been established, but you seek to have this Court draw an inference of fact, don't you?

25 MR. CROWLEY: Yes, I think so.

THE COURT: Then that becomes a question of fact in and of itself. Well, you may proceed, Mr. Crowley.

MR. CROWLEY: I think it is important, because of the narrowness of the facts, to check the chronology; statements made of interpretations of chronological developments make this necessary. The truth is that until late August 1956 the combination existed and Parke Davis --

THE COURT: I must say I still don't understand what the question of law is according to your view. Whether one event or action is the result of some prior event or action is a question of fact and not of law.

MR. CROWLEY: It is my position, Your Honor, that these are not a separate -- there is no real separation of these events, that they are one flowing --

THE COURT: I understand, but if I agree with you, then I think the case should be tried. Much depends upon circumstances. I can't determine as a question of law that there is no separation.

Now, I suppose I could hold as a matter of law that it is immaterial whether there is a separation or not, but if it is material whether there is a continuity, then that is a question of fact.

26 Well, I will let you present your matter in your own way. You may go ahead.

MR. CROWLEY: In September of 1956 Parke Davis discontinued its activities of causing the wholesalers not to sell. We will just summarize that by saying they discontinued the activity which was subsequently determined to be illegal in the form of a combination.

It has been stated that the reason for this was for business reasons they reached the conclusion that this was not good business on their part. The Supreme Court, in its opinion, stated a reason for this was that the Justice Department had commenced an antitrust investigation. At that time Parke Davis re-commenced selling directly to Dart Drug Company.

In Paragraph 6 of the final judgment it states that Dart agreed not to advertise Parke Davis products at cut rate price and Parke Davis continued to sell --

THE COURT: Who agreed? Is there a consent decree?

MR. CROWLEY: No, this is the final judgment. In the final judgment of the District Court, the final judgment after all appeals --

THE COURT: Final judgment in what case?

MR. CROWLEY: In 1064 --

THE COURT: Numbers don't mean anything. In which case?

27 MR. CROWLEY: United States against Parke Davis.

THE COURT: This is the Government's suit?

MR. CROWLEY: Yes.

THE COURT: And what is the agreement about advertising?

MR. CROWLEY: Paragraph Roman numeral VI of that final judgment, Dart Drug agreed to stop its cut price advertising and Parke Davis continued to sell to Dart until December 12, 1957.

THE COURT: I don't follow that. This was an action of the United States against Parke Davis. Was Dart Drug Company --

MR. CROWLEY: This is one of the very unusual features of this case, Your Honor, that Dart Drug was the complaining witness of the Government, and throughout the record and in the judgment and in the Supreme Court opinion and in the final judgment Dart Drug is actually named repeatedly as the --

THE COURT: Was Dart Drug made a party to the law suit?

MR. CROWLEY: No, Dart was not a party. They were the Government's principal witness.

THE COURT: This is most unusual.

28 MR. CROWLEY: Very unusual.

THE COURT: To have a judgment run against a witness; isn't that what it means?

MR. CROWLEY: No, the judgment didn't run against the witness. This is judgment against Parke Davis.

THE COURT: Well, also against Dart.

MR. CROWLEY: No, the judgment didn't run against Dart.

THE COURT: Well, Dart agrees not to carry certain types of advertisement, doesn't it? So that is a judgment against it.

MR. CROWLEY: This is not an injunction. This judgment here merely is reciting facts that occurred which bear on my argument here that the '57 --

THE COURT: Where is this judgment in the file, gentlemen?

MR. CROWLEY: It is known as the final judgment.

THE COURT: Is that annexed to your complaint?

MR. CROWLEY: Yes, it is attached to my motion as Exhibit A.

THE COURT: There is a final judgment attached to the complaint. Is that it?

MR. CROWLEY: April 19th, 1961. It was attached to the complaint and it is also attached to my motion.

29 THE COURT: I only need one. What paragraph or section?

MR. CROWLEY: I am reading now from Roman numeral VI, which is on page 4.

THE COURT: This is not a judgment. This seems to be a series of findings of fact. Isn't that what it really is?

MR. CROWLEY: It is the final judgment in this case.

THE COURT: I know it is entitled final judgment, but what does it adjudge? There seems to be a lot of findings.

MR. CROWLEY: Yes, there are a great many findings, and I am prepared now to go ahead and explain to you the answer to your question that you just asked.

THE COURT: Very well.

MR. CROWLEY: At the time that the final judgment was entered into, was signed, Parke Davis had submitted its proposed final judgment and the Government had submitted its proposed final judgment. As it turns out, the final judgment signed here is the exact judgment that was proposed by the Government. Now, in arriving at that, both parties filed oppositions to the other's proposed final judgment. In the opposition of the Government to Parke Davis' proposed final judgment we find on pages -- it is quite a lengthy document, but its purpose is to counter the inclusion in the final judgment of many of the findings of fact made by the District Court at two different times. The original findings of fact were

30 made on July 16, 1958 and another set were made in July of 1960.

Mr. Owen had referred to a finding which I believe was Supplemental Finding 12 and he referred to a finding in the earlier section with reference to unilateral. In this opposition to the Parke Davis' proposed final judgment we find that these matters were argued extensively --

THE COURT: I think that is all irrelevant. The final judgment as signed may be relevant, but various drafts and arguments on drafts are irrelevant.

MR. CROWLEY: My point is this, Your Honor: that the findings of fact that have been referred to in this case have been merged into this final judgment.

THE COURT: If findings have been signed and are part of the record I will consider them. If they were just drafts that have never been signed I shall not consider them; in fact, I will take no notice of them.

MR. CROWLEY: It is difficult in this case, Your Honor, because after the first set of findings the case went to the Supreme Court and in the opinion the Supreme Court wrote a forty page opinion in which it overruled many of these findings, it reversed them and sent it back --

31 THE COURT: Just a moment. The judgment was reversed by the Supreme Court.

MR. CROWLEY: This is correct.

THE COURT: Therefore, findings after the first trial are gone; they have no effect.

MR. CROWLEY: That is true.

THE COURT: And I don't want you to consume any time discussing them. I cannot take notice of them.

MR. CROWLEY: Then findings after the second trial are also, by the same rule --

THE COURT: If findings have been signed after the second hearing, of course I shall take notice of them, but I shall not take notice of drafts of findings that were not signed.

MR. CROWLEY: My point is that after the second set of findings the Supreme Court again reversed, sent this case back. This case went twice to the Supreme Court.

THE COURT: This case went twice to the Supreme Court?

MR. CROWLEY: Oh, yes. This went up in 365 U.S. 125 also. It came back again.

THE COURT: Proceed. Well, the only findings I shall consider are those findings that stand and are in effect, and I shall not consider any drafts.

MR. CROWLEY: Well, now let me see if I understand. There were two sets of findings made by the District Court which were --

32 THE COURT: I shall consider only that set that still stands.

MR. CROWLEY: In that case -- this is one of the problems with my argument, as to whether -- I would argue that none of those findings now stand.

THE COURT: Very well, then let's not talk about them. I thought you wanted me to consider those findings. If your position is that none of those findings stand, very well. Then if your position is well founded we need not consume any time discussing those findings.

MR. CROWLEY: Very good. My argument is that these were all merged in the final judgment.

THE COURT: There is no doubt about that. The Court agrees with you.

MR. CROWLEY: Now, much reference has been made to the Colgate case. In Parke Davis, 362 U.S. 29 at page 43, the Supreme Court states that:

> "Thus, whatever uncertainty previously existed as to the scope of the Colgate doctrine, Bausch & Lomb and Beechnut plainly fashioned its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act."

33 THE COURT: What are you reading from?

MR. CROWLEY: This is the decision, the first decision by the Supreme Court in this case.

THE COURT: What page?

MR. CROWLEY: That was page 43.

Mr. Owen claims that the act of cutting off Dart on December 12, 1957 was a unilateral act and they give reasons for this act. None of the reasons involve the stated --

THE COURT: Will you pardon me? I don't find the passage that you just read. Page 42 did you say?

MR. CROWLEY: No, I said 43.

THE COURT: I'm sorry. I have it. Thank you.

MR. CROWLEY: The cut-off was not based on Dart's refusal to sell at prices which the wholesaler or manufacturer demanded. They give many reasons why they cut Dart off. It goes back as far as in 1957, prior to the trial of this case, a motion was filed to advance it for an early trial, heard before Judge Laws.

THE COURT: I don't care about that.

MR. CROWLEY: The reason for this motion --

THE COURT: Please never interrupt the Court.

Why don't you argue the matter I have to decide and confine yourself to that. Whether there was a motion to advance or not is immaterial.

34 MR. CROWLEY: In the record there are stated four or five reasons why the '57 cut-off took place. The purpose of the motion to advance was because of the '57 cut-off. All of those reasons were stated, none of which have any bearing on the permission, the granting of the power that exists under Colgate of a manufacturer to cut off because of price.

THE COURT: He has a right to cut off for any reason.

MR. CROWLEY: Not according to this Parke Davis case.

THE COURT: So long as his action is unilateral and he does not combine with anyone else. Do you admit that?

MR. CROWLEY: No, not according to the language of this case. This is the Supreme Court's statement. It says just as clearly as can be:

> "Whatever uncertainty previously existed as to the scope of the Colgate doctrine, Bausch & Lomb and Beechnut plainly fashion its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act."

Now that is the Court's --

THE COURT: It does not mean that no other refusal to sell to customers is not permissible.

35 MR. CROWLEY: Well, it certainly can be interpreted to mean that.

THE COURT: Well, I don't so interpret it.

MR. CROWLEY: Then Parke Davis has stated many reasons why it cut Dart off.

THE COURT: Suppose it stated no reason?

MR. CROWLEY: But they did state reasons. This, I think, makes a difference.

THE COURT: I see. And what reasons did it state, Mr. Crowley?

MR. CROWLEY: It stated four or five reasons.

THE COURT: Don't bother reading it; just tell me in your own words what reasons it states.

MR. CROWLEY: They state that Mr. Haft's testimony -- Mr. Haft was the President of Dart Drug and was the Government's witness -- Parke Davis said that his testimony at the criminal trial was not credible. These are the reasons they gave.

THE COURT: You said they gave four or five reasons for cutting off Dart. Now what are the reasons that they gave?

MR. CROWLEY: That is one of them. I just stated it.

THE COURT: Who gave that reason?

MR. CROWLEY: Parke Davis.

THE COURT: Orally or in writing?

36 MR. CROWLEY: In writing, in that motion to advance which I was referring to.

THE COURT: No, I want to know what reason did they give in their communication to Dart.

MR. CROWLEY: None whatsoever, that I recall.

THE COURT: Now what are you trying to show, that as a matter of fact there was a hidden motive?

MR. CROWLEY: I am trying to show that throughout the theme of this case the seeking for a remedy for the deep discounting of Dart was the whole purpose of Parke Davis' activities and that they --

THE COURT: Very well, suppose it is. Now how is that a violation of the Sherman Act?

MR. CROWLEY: Because they were found to have violated the Sherman Act in 1956 for these activities against this company. Having been found guilty of these violations, it logically follows that the cut-off of 1957 is the direct result --

THE COURT: It does not logically follow at all.

MR. CROWLEY: -- of that activity.

THE COURT: You know, you are not meeting Mr. Owen's argument. Mr. Owen's argument may be wrong, but I want to know what the answer to it is. He says that prior to 1957, the 1956 conduct he admits was illegal because it was concerted action between Parke Davis and the

37 wholesalers. He says that the 1957 action was unilateral because Parke Davis did not combine with wholesalers and therefore it was legal. Now that is what I have to decide. Now what is your answer to that point?

MR. CROWLEY: My answer to that point is that the question was left open by the District Court in the final judgment, that that question is still a question to be answered and that is why this proceeding exists.

THE COURT: If that question is to be answered, then it is a question of fact.

MR. CROWLEY: If it's a question of fact, then this motion should be dismissed and we should go to trial on the issue.

THE COURT: Yes, but you conceded that there is only a question of law.

MR. CROWLEY: That is right. My opinion was that the facts, the facts upon which this question must be resolved are in this record.

THE COURT: Well, I am not going to make a finding of fact on a motion for summary judgment that there was a continuity between the 1956 and 1957 action because that involves motivation, inferences, and that involves a question of fact. Now, if it is material, if that is a

38 material issue it is an issue of fact. Now you show me how it is immaterial.

I think I should assume that the motive of Parke Davis was the same in 1957 as it was in 1956, namely, to try to cut off Dart because they were reducing prices too much, perhaps. But the question is whether the unilateral action is a violation of law. Concerted action clearly is.

MR. CROWLEY: Parke Davis repeatedly tried to get the District Court to include in its final judgment --

THE COURT: I don't care about that, what they tried to do. I am only interested in what was done.

MR. CROWLEY: I am trying to argue in answer to your question, Your Honor. The '56 cut-off of illegal activity of the summer of '56, Parke Davis' position was that this is separate and that it ended at that time. They tried to get the Court to find that this was a fact, but it was never found that. The final judgment does not --

THE COURT: I am not interested in what the Court did not find. I am only interested in what the Court found, if it is material.

MR. CROWLEY: By seeing the arguments, by knowing the arguments, the facts, these are in the record of the case, of what happened, we then can conclude that what did not happen was excluded by the Court. There was no relation. Now, in two or three of their paragraphs, suggested paragraphs for final judgment --

39 THE COURT: I don't care for suggested paragraphs. I will only consider what is in the final judgment.

MR. CROWLEY: The argument as a result of that the Government stated that this question should not be resolved -- that the conclusion should not be made by the District Court that this decision in '57 had been a unilateral act and that the 1956 illegal activity had ended at the end of August 1956, that these findings should not be made and that this question was a question that was available for a treble damage suit, it says it right in the papers, and that this should not be decided by that District Court at that time but should be left open for argument by any treble damage claimant.

THE COURT: Mr. Crowley, I will have to ask you to resume your seat if you don't follow the Court's instructions. I am not interested in what was not done. I am only interested in what was done in the District Court.

Is there anything else you wish to say?

MR. CROWLEY: I don't believe so, Your Honor.

THE COURT: Now I want to know this: do you claim -- and this is important -- do you claim that there was any concerted action in 1957 between Parke Davis and the wholesalers as against Dart?

MR. CROWLEY: No.

40 THE COURT: You do not?

MR. CROWLEY: We do not.

THE COURT: Very well. Thank you.

MR. OWEN: Your Honor, there are just one or two things I would like to see if I can clear up, from my point of view, at least.

On this question of whether there is a question of fact in the case, Your Honor is justifiably concerned about that, obviously, because you can't grant either motion if there is. There isn't a question of fact, for this reason --

THE COURT: Well, there isn't in view of Mr. Crowley's very frank answer to my last question.

MR. OWEN: All right. Fine. Then I will not address myself to that question.

Now, Mr. Crowley read Your Honor a passage from the opinion of the Supreme Court in the Parke Davis case, and I am not sure that it was fully understood, for this reason: because when he read it it came out saying what I say the law is, and therefore I would like to go over it again. This is the passage:

> "Thus, whatever uncertainty previously existed as to the scope of the Colgate doctrine, Bausch & Lomb and Beechnut plainly fashioned its dimensions" -- that is, Colgate's dimensions -- "as meaning no more than that ....."

41 This is what Colgate stands for.

THE COURT: I read this.

MR. OWEN: That is what we have in this case, Your Honor, a simple refusal to deal. In other words, the Supreme Court has said to us in Parke Davis that what Colgate means is a simple refusal to sell in order to prevent discounting is lawful, and that is precisely what we have in this case, it is a simple refusal. There was no combination, and Mr. Crowley has just so conceded.

Now there is one other point, Your Honor, about which I think there may be some confusion and that is the second time the Government's case went to the Supreme Court. I can see that Your Honor was a little surprised to hear that.

THE COURT: Well, I sent for the book. It is clear enough.

MR. OWEN: You realize, Your Honor, that in that second proceeding there was no question that involves us here.

THE COURT: All that the second proceeding resulted in was that the case was retained on the docket instead of --

MR. OWEN: That is correct. The difficulty was that this Court in July of 1960 did two things: it denied injunctive relief and it failed, inadvertently or purposely, whatever, to enter a judgment on the merits declaring that Parke Davis had violated the law in 1956. The Govern-

42 ment did not appeal the denial of injunctive relief, but it did want a judgment on the merits, so it went back up to the Supreme Court and said please order the District Court to enter a judgment on the merits simply declaring that Parke Davis violated the law in '56. And that is what the District Court did and that is all it did. If Your Honor reads Roman I paragraph of that judgment, all this Court has ever done --

THE COURT: I don't think you need to go into that.

Now where does the letter of December 12th, 1957 appear in the record here?

MR. OWEN: I quoted it in full, Your Honor.

THE COURT: It may be in your points and authorities, but where is it in the record?

MR. OWEN: It is in the transcript upon which Mr. Crowley relies.

THE COURT: But I want to have it before me.

MR. OWEN: I don't blame you, Your Honor, and I am trying to think how to get it before you.

THE COURT: We will take our usual mid-morning recess, we would be taking it in about five minutes anyway, and in the meantime you try to locate it in the file.

MR. OWEN: I will. Thank you.

THE COURT: It is a rather voluminous file.

That is what the case hinges on.

43 MR. OWEN: You are quite right, Your Honor. Thank you.

(Brief recess.)

MR. OWEN: In response to Your Honor's question about the letter, I am afraid as a practical matter I can't officially do it the way Your Honor would like, but let me say this, that it is quoted in its entirety, verbatim, in a paper in the file.

THE COURT: That is what I want to know. Where is it?

MR. OWEN: And Mr. Crowley and I are prepared to stipulate that that is --

THE COURT: In other words, I want to be sure that it is a part of the record on this motion.

You must realize that the Court of Appeals has held that points and authorities and memoranda are not part of the record.

MR. OWEN: Quite right, Your Honor.

THE COURT: I saw this, but that is in your points and authorities.

MR. OWEN: Quite right, Your Honor.

THE COURT: Now where is the letter?

MR. OWEN: Let me say this. This is going to get a little involved. Technically it is in the record, but it is not printed there.

44 THE COURT: I don't care whether it is or not. All I want to be sure is whether it is in the record. Now where is it in the record?

MR. OWEN: It appears in the record in the transcript of the trial in the Government case, which technically is a part of this record, I

believe, Your Honor, because the plaintiff has relied -- put this in as part of his motion for summary judgment.

THE COURT: Let me see.

MR. OWEN: But unfortunately the transcript is a bound volume.

THE COURT: I don't need it physically. I want to make sure it is part of the record on this motion, that is all I want to know, because I would not want to find myself in the embarrassing position of having decided any case on an item of evidence that is not in the record.

MR. OWEN: Fair enough, Your Honor.

THE COURT: Now where in the plaintiff's motion do they embody --

MR. OWEN: Can you point that out, Mr. Crowley?

THE COURT: I have the motion here.

MR. OWEN: I think it is in --

THE COURT: I think you should have had an affidavit annexing that letter so it be part of the record.

45 MR. OWEN: You are absolutely correct, Your Honor, and I apologize to the Court for not having done so. But let me say this, if I may. Mr. Crowley and I are prepared to stipulate into the record formally that that quoted passage there is precisely the letter in its entirety.

THE COURT: Well, are you prepared to stipulate that that letter as quoted shall be considered as part of the record?

MR. OWEN: I believe we are prepared.

THE COURT: Are you prepared to stipulate?

MR. OWEN: I certainly am.

THE COURT: What about you, Mr. Crowley?

MR. CROWLEY: Yes, I am, Your Honor.

THE COURT: Will you state the stipulation, Mr. Crowley, in your own way?

MR. CROWLEY: I will stipulate that the letter dated December 12 from Parke Davis to Dart Drug Company is part of this record.

THE COURT: Well, as it is quoted in the defendant's points and authorities?

MR. CROWLEY: Yes, as it is quoted in the defendant's points and authorities.

THE COURT: Thank you, gentlemen. Did you wish to say anything more, Mr. Crowley?

MR. CROWLEY: No, Your Honor.

* * * * *

[Filed Oct. 3, 1963]

FINAL JUDGMENT

Both parties having moved for summary judgment on the issue of liability pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered said motions and the entire record and having heard oral argument on same, and the Court having decided, for the reasons set forth in its opinion of September 27, 1963, that the plaintiffs have failed to state a claim upon which relief may be granted, it is

ORDERED that the plaintiffs' motion be and hereby is denied and that the defendant's motion be and hereby is granted, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant be and hereby is granted summary judgment in its favor and that the complaint be and hereby is dismissed with costs to the defendant and interest thereon.

/s/ Alexander Holtzoff
United States District Judge

October 3, 1963
[Certificate of Service]

[Filed Oct. 9, 1963]

46 OPINION OF THE COURT

THE COURT: This is an action for triple damages under the Sherman Act. It is before the Court at this time on cross motions for summary judgment, both sides conceding that there are no material issues of fact and that only a question of law is presented.

The action arises out of a refusal by the manufacturer of drugs and similar commodities to sell to a particular retail dealer who sells to consumers at prices considerably lower than the manufacturer's list prices. The retailer sues for triple damages, claiming that the action of the manufacturer, the defendant in this instance, is a violation of Section 1 of the Sherman Act.

At common law any manufacturer or trader had a right to deal or refuse to deal with anyone that he chose, unless indeed he was engaged in a public calling; but even at common law he could not combine with others and enter an agreement with others not to sell to a particular individual. These views were developed in a very scholarly way and very thoroughly by Judge Taft, as Circuit Judge, in the celebrated Addyston Pipe case, which is a classic in the law of restraints of trade.

Section 1 of the Sherman Act makes illegal contracts, combinations and conspiracies in restraint of trade. There are those who have doubted

47 whether the Sherman Act, in Section 1, has added anything to substantive law. It does provide additional remedies that did not exist at common law.

This brings us to a consideration of the specific issue presented in this case. The plaintiff, Dart Drug Corporation, owns and operates a number of retail drug stores. It sells various products of that type at prices below the manufacturers' list prices. One of these manufacturers is Parke, Davis & Company, the defendant in this action. In 1956 Parke, Davis & Company declined to make any further sales to the plaintiff and induced various wholesale dealers to do likewise. The Government brought a civil action for an injunction under the Sherman Act. The Supreme Court sustained the position of the Government. It called attention

to the fact that it had been held, in United States v. Colgate & Co., 250 U.S. 300, that the Sherman Act does not prevent a manufacturer engaged in a private business from refusing to deal with persons who decline to conform to prices fixed by the manufacturer in reselling the merchandise.

The doctrine of the Colgate case has been subjected to numerous limitations and qualifications over the years. In the Parke Davis case, 362 U.S. 29, the Court held that the doctrine of the Colgate case did not apply to a situation where the manufacturer combined with the wholesalers, or anyone else, presumably, to refuse to deal with a particular

48 retailer. Such an action constituted a contract or combination or conspiracy in restraint of trade. It was pointed out, however, by the Supreme Court in the Parke Davis case, at page 43, that the Colgate doctrine still held, despite all its limitations and restrictions, that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act.

It is a natural inference from that statement that a simple refusal to sell to customers for any purpose or for any reason is permissible, provided there is no attempt to induce others to follow that course.

On December 12th, 1957 the defendant wrote a letter to the plaintiff, stating that the defendant did not wish to have any further business relations with the plaintiff and that the plaintiff's account was being closed permanently effective immediately.

Admittedly there was no attempt to induce wholesalers or distributors from selling Parke Davis products to the plaintiff and admittedly it is still open to the plaintiff to buy these products from various wholesalers and distributors. To be sure, as a matter of business practice the plaintiff would have to pay a larger price to wholesalers than it would to the manufacturer since the middleman necessarily makes a profit.

49 The Court inquired of counsel for the plaintiff whether there was any claim here that there was any concerted action subsequent to December 12th, 1957 or in conjunction with the action of that date. With commendable candor plaintiff's counsel answered in the negative.

Thus we have in this action a simple refusal on the part of a manufacturer to sell his goods to a specific retailer. No effort is being made by the manufacturer to cut off other sources of supply to the retailer.

The Court is of the opinion, in the light of the opinion of the Supreme Court in the Parke Davis case, to which reference has been made, as well as the Colgate case, that the action taken by the defendant does not constitute any violation of law.

It is argued by counsel for the plaintiff, however, that because it had been adjudged that prior to 1957 the defendant was guilty of entering into a combination in restraint of trade not to deal with the plaintiff, that therefore the unilateral action complained of in this suit, even though it was not taken in concert with anyone else, must be deemed to have been a product of the original combination and therefore subject to the same condemnation. The Court disagrees. The mere fact that a
50 person has violated the law on one occasion is no proof that some later action of his which on its face is not a violation of law must be tainted with the illegality of the prior act.

In view of these considerations the Court reaches the conclusion that the plaintiff has not established an action for triple damages and therefore the defendant's motion for summary judgment will be granted and the plaintiff's motion for summary judgment denied.

You may submit an order in accordance with this decision.

[Filed November 1, 1963]

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs, Dart Drug Corporation and its wholly owned subsidiary corporations named as plaintiffs herein, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the Order entered by the United States District Court for the District of Columbia on October 3, 1963, granting Defendant's Motion for Summary Judgment and denying the Plaintiffs' Motion for Summary Judgment.

A bond for costs on appeal in the sum of Two Hundred Fifty Dollars ($250.00) is filed herewith.

/s/ Robert Hirsch
Attorney for Plaintiffs

[Certificate of Service]

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,268

DART DRUG CORPORATION, et al.,

Appellants,

v.

PARKE, DAVIS & COMPANY,

Appellee.

Appeal From The United States District Court
For The District of Columbia

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STATEMENT OF QUESTION PRESENTED

Whether, on Appellee's motion for summary judgment, the District Court erred in concluding that the only reasonable inference which could be drawn from the facts of record was that Appellee's December, 1957 refusal to deal with Appellant was a unilateral action and not in furtherance of a continuing unlawful combination and conspiracy formed in 1956.

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TABLE OF AUTHORITIES

Cases

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18, 268

DART DRUG CORPORATION, et al.,

Appellants,

v.

PARKE, DAVIS & COMPANY,

Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Jurisdiction of this action for conspiracy in restraint of trade was conferred on the District Court by 28 U.S.C. §1338 and 15 U.S.C. §§ 1, 3, 15, and 22. That Court entered a final order granting Defendant-Appellee's motion for summary judgment. Jurisdiction to review this order is conferred on this Court by 28 U.S.C. §1291 and 15 U.S.C. § 1121.

STATEMENT OF THE CASE

Plaintiff-Appellants (hereinafter referred to collectively as "Dart"), operate retail discount drug stores in the Metropolitan Washington area. Defendant-Appellee (hereinafter referred to as "Parke Davis"), is a manufacturer of various drug products. Dart brought suit in the United States District Court for the District of Columbia on January 11, 1962, alleging violations of Sections 1 and 3 of the Sherman Act in that Parke Davis cut off Dart as a direct buyer of its products in 1957 and changed its distribution program in 1961 in furtherance of an existing conspiracy in restraint of trade.

The facts pertinent to the instant proceeding began to materialize in 1954. From April 6, 1954 until July, 1956, Dart was able to make purchases of Parke Davis' products directly from Parke Davis itself (J.A. 5). Although Dart also purchased Parke Davis' products from wholesalers, it was able to realize considerable savings by making purchases directly from Parke Davis (J.A. 5, 8). Sometime before 1956, Parke Davis announced a resale price maintenance policy in its wholesalers' and retailers' catalogues. These catalogues specifically listed suggested minimum resale prices. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 32 (1960).

For a short time prior to the summer of 1956, certain retailers of Parke Davis products in the Washington Metropolitan Area had been engaged in price cutting (J.A. 16). When Dart began to engage in deep price cutting, Parke Davis' Baltimore branch manager inquired at a branch managers' meeting as to a possible remedy (J.A. 16). He was informed that the company position was that the Baltimore branch manager could use unilateral refusals to deal with retailers who would not adhere to recommended resale prices (J.A. 16).

Subsequently, in July of 1956, the Baltimore branch manager put into effect a program promoting observance of the suggested minimum retail prices by retailers of Parke Davis' products. To insure that retailers who refused to adhere to the suggested prices would be cut off from their sources of supply, Parke Davis representatives visited the wholesalers and informed them that Parke Davis would refuse to sell to wholesalers who did not comply with the policy announced in its catalogue and who sold to retailers who sold below suggested minimum retail prices (J.A. 16). All of the wholesalers interviewed expressed a willingness to cooperate in this scheme. *United States v. Parke, Davis & Co., supra*, at 33. Parke Davis representatives also visited the retailers involved and informed them that if they did not adhere to the suggested minimum retail prices, Parke Davis would refuse to deal further with them and also that the wholesalers would refuse to sell Parke Davis products to them. *Id.* at 33-34.

Several retailers, including Dart, refused to give assurances of compliance and persisted in advertising and selling Parke Davis products at prices below the suggested minimum. *Id.* at 34. Parke Davis furnished the names of these retailers to the wholesalers. *Ibid.* At this point, Parke Davis refused to fill direct orders for such retailers, and the wholesalers refused to fill the orders which such retailers sent to them. *Ibid.* However, five of the price-cutting retailers, including Dart, continued selling Parke Davis products from stocks they had on hand at prices below the suggested minimum. *Id.* at 35.

In August, Parke Davis decided to adopt a program under which retailers would agree to refrain from advertising their discount sales of Parke Davis vitamins (J.A. 17). Upon inquiry by Parke Davis. Dart's president indicated that Dart would stop advertising but would continue its discount selling (J.A. 17). The other retailers said that they would stop advertising if Dart would (J.A. 17). Pursuant to this

combination, all of the retailers suspended their discount advertising of Parke Davis vitamins after August 28, 19[illegible]. *United States v. Parke, Davis & Co., supra,* at 36. At this juncture, the wholesalers began selling Parke Davis products to all retailers again. *Ibid.* But a month later, when one of the retailers began advertising again, the other retailers began to do likewise. *Ibid.*

Then, in late August or early September, 1956, upon the complaint of Dart, the Department of Justice began to conduct an investigation of a suspected antitrust violation by Parke Davis (J.A. 79). The existence of this investigation became known to Parke Davis, whereupon it temporarily refrained from overt promotion of retailer adherence to suggested retail prices *(United States v. Parke, Davis & Co., supra,* at 36*)*, although there is no record basis whatsoever for a finding that the combination and conspiracy later found to be illegal was discontinued.

On May 2, 1957, the United States instituted criminal and civil actions (Criminal No. 444-57 and Civil Action No. 1064-57) against Parke Davis, alleging that Parke Davis had combined and conspired with wholesalers to prevent retail discounting and had thereby violated Section 1 of the Sherman Act (J.A. 79). Dart was the complaining witness in both the criminal action and the civil action (J.A. 83).

The criminal action was tried from October 29 until November 4, 1957. After the Government's case had been presented, a judgment of acquittal was entered (J.A. 31).

Slightly more than a month later Parke Davis sent a letter dated December 12, 1957 to Dart. The letter was terse, stating only that Parke Davis would no longer sell directly to Dart (J.A. 12, 80). This refusal to deal, which hereinafter will be referred to as the 1957 refusal to deal, persists to this date (J.A. 12). Dart has requested on several occasions that it be permitted to buy directly from Parke Davis.

These requests have been fruitless (J.A. 68, 76). Thus, since December 12, 1957, Dart has only been able to purchase Parke Davis products through wholesalers, who sell such products at a substantial mark-up (J.A. 5). Moreover, Dart has been unable to obtain the volume of Parke Davis merchandise required for its business, since wholesalers are unable to supply the necessary volume (J.A. 31-32). After the cut-off, certain representatives of Parke Davis indicated to Dart's president that this action was taken because of the role he played in the criminal action (J.A. 56-67).

On June 24, 1958, the trial of the Government's civil action against Parke Davis commenced in the District Court for the District of Columbia and resulted in a judgment of dismissal in favor of Parke Davis on July 16, 1958 (J.A. 8, 80). Dart's president was the principal Government witness at this trial (J.A. 83). On February 29, 1960, the Supreme Court reversed the decision of the District Court and remanded the case with directions to enter appropriate judgment enjoining Parke Davis from further violations of the Sherman Act unless Parke Davis could demonstrate from competent evidence that injunctive relief was no longer necessary. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

On remand, Parke Davis presented only one witness who testified on the issue of whether Parke Davis should be enjoined. On July 18, 1960, the District Court found that the illegal practices had ceased prior to the Government's initiation of the suit (J.A. 9, 80-81). The Court not only refused to issue an injunction but also refused to find that Parke Davis had violated the law (J.A. 81).

The Government again appealed to the Supreme Court, and on January 23, 1961, that Court, in a *per curiam* opinion, announced that the District Court had erred by failing to render an adjudication that Parke Davis had violated the Sherman Act. The Supreme Court had

already repudiated the findings of the District Court, stating that:

> "It does not appear even that Parke Davis has announced to the trade that it will abandon the practices we have condemned." 362 U.S. at 47-48.

The Supreme Court vacated the order of the District Court and remanded the case with direction to enter a judgment accordingly and to retain the case on the docket for future action in the event the Government applies for further relief. *United States v. Parke, Davis & Co.*, 365 U.S. 125 (1961).

On April 19, 1961 the District Court, after reciting that the Supreme Court had vacated the July 18, 1960, order of the District Court, entered final judgment (J.A. 15-18). The final judgment contains, *inter alia*, the following finding of fact:

> "Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy. Sometime later in July, and again in the latter part of August, Parke, Davis representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell to it. Dart Drug agreed to stop its cut price advertising and Parke, Davis continued to sell to Dart Drug until December 12, 1957 when it advised that concern that it would no longer sell to it on a direct basis. Dart is still able to obtain Parke, Davis supplies from its wholesalers but at a higher cost than when it was able to buy direct from Parke, Davis."

In February, 1961, less than one month after the second Supreme Court decision, Parke Davis instituted a new method of distribution, whereby it sells its goods in large packages only to direct buyers and sells goods in smaller package sizes through wholesalers (J.A. 5-6). Thus, Dart, who can only purchase Parke

Davis products from wholesalers, is unable to obtain Parke Davis goods in large packages (J.A. 6). It may purchase only the small package sizes available through drug wholesalers and must pay a considerably higher cost than it would have to if it could purchase directly from Parke Davis (J.A. 6).

On January 11, 1962, Dart filed the instant suit for treble damages in the United States District Court for the District of Columbia, alleging that Parke Davis' December 1957 cut-off of Dart and the 1961 Distribution Change were acts in furtherance of the continuing conspiracies condemned by the Supreme Court in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and were, therefore, violations of Sections 1 and 3 of the Sherman Act, 15 U.S.C., §§1, 3 (1958) (J.A. 2-11).

Finally, on April 18, 1962, three months after the commencement of this action, Parke Davis for the first time announced to the public that it intended to discontinue the policy used to implement the conspiracy to fix resale prices. On that date, Parke Davis announced the adoption of a new, relaxed distribution policy which contemplated that Parke Davis would thenceforth sell directly to any retailer licensed by the state boards of pharmacy (J.A. 82, 83-84).

The parties filed motions for summary judgment on this action (J.A. 114). On September 27, 1963, the District Court held a hearing on the motions (J.A. 85-114). Upon concluding that counsel for Dart had conceded at the hearing that the 1957 refusal to deal constituted unilateral action on the part of Parke Davis, Judge Holtzoff granted Parke Davis' motion for summary judgment (J.A. 116-117).

STATUTES INVOLVED

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C. §3

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (The Sherman Act)

STATEMENT OF POINTS

I. In order to grant summary judgment for appellee, the Court must find that the only reasonable inferences which could be drawn from the facts of record were (a) that the 1956 conspiracy in violation of the Sherman Act had terminated prior to appellee's refusal to deal with appellant and (b) that defendant did not enter into a fresh conspiracy in 1957 prior to the refusal to deal. The District Court erred in granting appellee's motion for summary judgment because a trier of fact could have reasonably concluded from the facts of record that the

1957 refusal by Parke, Davis to deal with Dart was an act to induce adherence by other drug retailers to the unlawful conspiracy which had continued in existence since 1956.

II. The District Court erroneously granted the appellee's motion for summary judgment because a trier of fact could have properly found that the refusal to deal was designed to penalize Dart for breaching a continuing agreement to the effect that Dart would not advertise Parke Davis products at discount prices. This agreement was a material element of the continuing conspiracy which was held to violate the Sherman Act and such retaliatory action was designed to further the objects of the conspiracy.

III. The District Court erred in granting appellee's motion for summary judgment because a trier of fact could have properly found that the refusal to deal was an act of retaliation against Dart for cooperation with the United States Government in the criminal prosecution of Parke Davis for violations of the Sherman Act and in the civil action premised on the same facts brought by the Government against Parke Davis. A trier of fact could have properly found that such retaliation was designed to further the continuing conspiracy by providing an object lesson of punishment for cooperation with the Government and to remove Dart as an obstruction to the success of the continuing price maintenance conspiracy in violation of the Sherman Act.

SUMMARY OF ARGUMENT

The District Court granted Parke Davis' motion for summary judgment on the basis that counsel for Dart had conceded in oral argument that Parke Davis had not engaged in "concerted action" on or after the date of the refusal to deal in December, 1957. This premise relied upon by the Court was incorrect.

Dart in its complaint clearly alleges that the refusal to deal was in furtherance of a conspiracy which had existed since 1956. Counsel for Dart consistently adhered to this position during the course of oral argument.

When asked by the Court whether Dart claimed that there was concerted action in 1957 between Parke Davis and the wholesalers, counsel for Dart rendered a negative reply. Considering the question as framed by the Court, counsel's reply meant simply that no contention was made that Parke Davis and the wholesalers entered into a fresh conspiracy in 1957 and jointly performed overt acts in pursuance thereof.

Thus, before the Court could properly grant summary judgment, the Court had to find that the only reasonable inference from the facts before it was that the 1956 conspiracy had terminated prior to the 1957 refusal to deal with Dart and that no fresh conspiracy was entered in 1957 which existed at the time of the refusal to deal.

In granting the motion for summary judgment the Court erroneously ignored the well established principle of law that a conspiracy "having continuity of purpose" is presumed to continue until the conspirators undertake to abandon the conspiracy through unequivocal affirmative acts. The facts of record in this case demonstrate that Parke Davis had not performed any overt act of abandonment of the price fixing conspiracy formed in 1956 prior to the 1957 refusal to deal with Dart. Moreover, even in the absence of the well established

legal principle that a conspiracy "having continuity of purpose" is presumed to continue until affirmative acts of abandonment occur, the record in this action contains facts which would support a conclusion by the trier of facts that the 1957 refusal to deal was an overt act designed to further the objects of the continuing conspiracy formed in 1956.

Therefore the District Court erred in granting Appellee's motion for summary judgment.

ARGUMENT

I.

In Order To Grant Summary Judgment for Appellee, the Court Must Find That the Only Reasonable Inferences which Could Be Drawn From the Facts of Record Were (A) That the 1956 Conspiracy in Violation of the Sherman Act Had Terminated Prior to Appellee's Refusal To Deal With Appellant and (B) That Appellee Did Not Enter Into a Fresh Conspiracy in 1957 Prior to the Refusal To Deal. The District Court Erred in Granting Appellee's Motion for Summary Judgment Because a Trier of Fact Could Have Reasonably Concluded From the Facts of Record That the 1957 Refusal by Parke Davis To Deal With Dart Was an Act To Induce Adherence by Other Drug Retailers to the Unlawful Conspiracy Which Had Continued in Existence Since 1956.

During the hearing on the motions for summary judgment, counsel for Dart strenuously argued that a conspiracy or combination violative of the Sherman Act formed in 1956 was still in existence in December, 1957, when Parke Davis notified Dart of its decision to stop supplying products to Dart (J.A. 99, 100, 101, 109). When asked by the District Court Judge whether he claimed that there was "concerted action in 1957 between Parke Davis and the wholesalers as against Dart,"

counsel for Dart rendered a negative reply. The District Court, based on what it characterized as a concession by Dart's counsel that there was no "concerted action" on or after December 12, 1957, determined that the action complained of was unilateral in nature rather than the product of a conspiracy and granted Parke Davis' motion for summary judgment (J.A. 114-117).

The fallacies in the premise upon which the Court granted summary judgment are readily apparent. Counsel had given a negative reply to the Court's question whether there was any concerted action between Parke Davis and wholesalers in 1957. Initially, it must be observed that the term "concerted action" is not embraced within the Sherman Act, which speaks of contracts, combinations and conspiracies. Hence, in conceding a lack of concerted action in 1957, counsel was not indicating that the 1956 conspiracy was no longer in existence. A conspiracy or combination within the meaning of the Sherman Act may continue in existence although at a given time there is a lack of overt action by the conspirators in furtherance thereof. Counsel interpreted "concerted action" as referring to overt action by the conspirators. Dart has never contended that the conspirators engaged in any overt action in 1957 other than the refusal to deal. Dart has always strenuously contended that the 1956 conspiracy continued to exist until April, 1962. Second, the Court's question as to concerted action in 1957 led counsel reasonably to believe that the Court was asking if counsel contended that a fresh conspiracy was formed in 1957. Dart has never contended that a fresh conspiracy was formed in 1957. Dart's contention is that the 1956 conspiracy continued to exist in 1957. Third, the question asked of counsel only inquired as to the existence of "concerted action" between Parke Davis and wholesalers in 1957. Thus, in giving a negative reply, counsel was indicating simply that Parke Davis and the wholesalers did not enter into a fresh conspiracy in 1957 and

did not jointly engage in overt actions in pursuance thereof. Hence, the District Court based its ruling below on a false premise. In reality, before the Court could properly grant summary judgment, the Court had to find that the only reasonable inference from the facts before it was that the 1956 conspiracy had ended prior to the refusal to deal and that there was no fresh conspiracy in 1957 prior to the refusal to deal. Counsel steadfastly contended before the District Court that the 1956 conspiracy had not terminated in 1957, when Parke Davis terminated its dealing with Dart. In fact, Dart's contention is that the 1957 refusal to deal was designed to coerce revitalized retailer adherence to that still existent conspiracy.

A summary judgment may only be rendered when the moving party is entitled to judgment as a matter of law and there are no genuine issues of fact. Fed. R. Civ. P. 56(c); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). In the case at bar, since the established facts were subject to varying interpretations, there were genuine issues of fact. In reviewing the ruling of the District Court, this Honorable Court will look at the facts in the record on summary judgment in the light most favorable to Dart -- the party who opposed the motion. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

Of extreme significance in this regard is the recent exhortation of the Supreme Court that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). *Accord, White Motor Co. v. United States*, 372 U.S. 253, 259 (1963).

Parke Davis asserted below, and the District Court concluded as a matter of law, that the 1957 refusal to deal was unilateral in nature and therefore legal. The Court relied upon the doctrine of *United States v. Colgate & Co.*, 250 U.S. 300 (1919). *Colgate* stated that a unilateral refusal to deal for failure to observe resale price maintenance terms was lawful in the absence of proof of a contract or combination to fix resale prices. The *Colgate* doctrine has been substantially narrowed by subsequent decisions which establish far less restrictive requirements of proof. See, *e.g.*, *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. Schrader's Son, Inc.*, 252 U.S. 85 (1920). In the *Beech Nut* decision, the Supreme Court recognized that coercive measures may be as successful as agreements fixing resale prices and held that the securing of customer adherence by such methods constituted the formation of a combination violative of the Sherman Act. *Id.* at 455. The present standard, articulated by the Supreme Court in *United States v. Parke, Davis & Co.*,362 U.S. 29 (1960), has left only a narrow passage "through which a manufacturer may pass. . .[only if] the facts. . .[are] of such Doric simplicity as to be somewhat rare in this day of complex business enterprise." *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960). The standard enunciated in *United States v. Parke, Davis & Co.*, *supra*, at 44, is as follows:

> "[A suppression of competition] is tolerated...only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.' When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing considera-

> tion is not present and therefore he has put together a combination in violation of the Sherman Act."

Although the Supreme Court in that decision specifically denounced the involvement of "wholesalers to stop the flow of Parke Davis' products to the retailers, thereby inducing retailers' adherence to its suggested retail prices," the Court observed that the price-fixing conspiracy between the manufacturer and retailers alone constituted a violation of the Sherman Act.[1] The Court stated that if Parke Davis and Peoples Drug Stores (drug retailers) did in fact enter a price maintenance agreement, express, tacit, or implied, "such agreement violated the Sherman Act without regard to any wholesalers' participation." *Id.* at 45, n. 6. Thus, it is apparent that simple and seemingly innocent acts by a manufacturer involving only one level of competition may be sufficient to create a combination or conspiracy violative of the Sherman Act. For instance, a manufacturer's termination of dealing with a jobber who persists in cutting prices after a warning to cease the practice, when such termination occurs after a complaint from a single competing jobber, amounts to a combination violative of the Act. *Girardi v. Gates Rubber Co. Sales Div., Inc.*, 5 CCH Trade Reg. Rep. ¶70,961 (9th Cir. 1963). The *Girardi* Court explicitly remarked that the "simplicity and limited scope of the actions alleged to have been taken" provide no immunity from Sherman Act coverage. *Id.*, p. 78,815. See also *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960).

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[1] Thus, assuming *arguendo* that the negative reply of counsel to the question of the District Court, alluded to above, could be fairly construed as a concession that there was no continuing conspiracy between Parke Davis and wholesalers in 1957, the continuation of the 1956 conspiracy or combination with the retailers could still be inferred and would amount to a violation of the Sherman Act.

From the facts presented in the instant proceeding, a jury could have properly inferred that the December, 1957 refusal to deal with Dart, was designed to revitalize the very price maintenance scheme condemned by the Supreme Court in *United States v. Parke, Davis & Co., supra.* The Court noted during the course of its opinion in that case that prior to the litigation, Parke Davis "stopped trying to promote the retailers' adherence to its suggested resale prices. . . ." *Id.* at 36. However, temporary cessation of rigorous enforcement of the scheme is not the equivalent of explicit rescission or repudiation of the scheme. In answer to the District Court's conclusion that there was no reason to believe Parke Davis would repeat its alleged unlawful acts, the Supreme Court issued the following admonition:

> "It does not appear even that Parke Davis has announced to the trade that it will abandon the practices we have condemned. So far as the record indicates any reason, it is that Parke Davis stopped its efforts because the Department of Justice had instituted an investigation." *Id.* at 47-48.

Since the facts of record demonstrate that Parke Davis had not undertaken any affirmative act of abandonment, withdrawal or repudiation of the price maintenance conspiracy prior to December 12, 1957, it must be presumed that the conspiracy condemned by the Supreme Court in *United States v. Parke, Davis & Co., supra,* was still in existence at the time that Dart was cut off by Parke Davis for the second time. *Hyde v. United States,* 225 U.S. 347, 369 (1911); *Local 167, I.B.T. v. United States,* 291 U.S. 293, 298 (1933); *United States v. National Assn. of Leather Glove Mfgrs.,* 1954 CCH Trade Cases ¶67,852 (N. D. N. Y. 1954); *United States v. Greater Kansas City Retail Coal Merchants' Assn.,* 85 F. Supp. 503, 510 (W.D. Mo. 1949). In *Hyde v. United States, supra,* the Supreme Court pointed out the vital difference between "accomplished conspiracies" and conspiracies "having

continuity of purpose." Clearly the price maintenance conspiracy commenced by Parke Davis and others in 1956 was a conspiracy "having continuity of purpose." In its *Hyde* opinion the Court said:

> "The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue, it would seem necessarily to follow the relation of the conspirators to it may continue, being to it during its life as it was to it the moment it was brought to life. . . . This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. ... Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. **It requires affirmative action but certainly that is no hardship.** Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law." 225 U.S. at 369. (Emphasis supplied.)

The only action by Parke Davis disclosed in this record which might be construed to be an affirmative act of withdrawal from the price fixing conspiracy formed in 1956 was its April 18, 1962 announcement that it would henceforth sell to any retailer licensed by state boards of pharmacy. It should be noted that this announcement was made long after the 1957 refusal to deal with Dart.

Even in the absence of the well established legal principle that a conspiracy "having continuity of purpose" is presumed to continue until affirmative acts of abandonment occur, the record in this action contains facts which would support a conclusion by the trier of fact that the 1957 refusal to deal was an overt act designed to further the objects of the continuing conspiracy formed in 1956.

A jury is ordinarily entitled to infer that a prior existing condition remained in existence at a later date absent a showing to the contrary. 2 WIGMORE, EVIDENCE §437 (3d ed. 1940). A temporary restraint from enforcing wholesaler and retailer adherence to the plan does not *ipso facto* render the plan nonexistent. Moreover, the conspiracy could be implied from the entire course of dealing by Parke Davis with the wholesalers and retailers in 1956 and 1957 and from all the surrounding circumstances. *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 210 (1921). The existence of a conspiracy in restraint of trade may be and usually is proved entirely by circumstantial evidence. *Girardi v. Gates Rubber Co. Sales Div., Inc., supra*, p. 78, 816.

The second refusal of Parke Davis to deal with Dart occurred approximately five weeks after the 1957 acquittal of Parke Davis in the criminal proceeding but prior to the Supreme Court decision in the Government's civil action. A jury could logially infer that as a result of the acquittal Parke Davis immediately removed the temporarily self-imposed shackles from the enforcement of its continuing price-maintenance conspiracy. There could be no more logical target for Parke Davis' enforcement effort than Dart. Just as Parke Davis had used Dart's acquiescence as the "lever" to induce retailer adherence to its 1956 scheme for suspending advertising of cut-rate prices,[2] it might punish a "disobedient" retailer of Dart's magnitude in December of

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[2] The Supreme Court made the following comment regarding the behavior of Parke Davis in setting up the "suspension of advertising" plan:

> "First, it discussed the subject with Dart Drug. When Dart indicated willingness to go along, the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescene in the program." *United States v. Parke, Davis & Co.*, 362 U.S. at 46.

1957 in order to coerce price-cutting retailers into paying heed to the unrepudiated price-maintenance conspiracy. Considering these salient facts together with all the other circumstances presented by the record on summary judgment, a jury could have logically determined that the severance of the direct flow of Parke Davis products to Dart was designed to revitalize the still existing price-maintenance conspiracy and was performed in furtherance of that continuing conspiracy violative of the Sherman Act.

The purpose motivating the 1957 refusal to deal--a desire to coerce uniform retailer adherence to the scheme in which almost all of the retailers had initially acquiesced--was clearly unlawful. In this regard, the following language from the decision in a similar case, *A. C. Becken Co. v. Gemex Corp.*, 272 F. 2d 1, 3-4 (7th Cir. 1959) *cert. denied* 362 U.S. 962 (1960) is most appropos:

> "A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it may not be used to accomplish an unlawful purpose. . . . The established facts. . . show that the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according to defendant's existing illegal plan of doing business in violation of §1. Plaintiff was not rejected as a customer because of any other reason. It follows that the facts alleged. . . state a cause of action under §1. . . ."

In the case at bar, the "wrench" was used in an "assault" calculated to insure retailer compliance with the Parke Davis resale price maintenance conspiracy. The termination of dealing was not a "simple" refusal to deal but rather an act in furtherance of an existing conspiracy in violation of the Sherman Act. Therefore, the District Court erred in granting the motion for summary judgment.

II.

The District Court Erroneously Granted the Appellee's Motion for Summary Judgment Because a Trier of Fact Could have Properly Found That the Refusal To Deal Was Designed To Penalize Dart for Breaching a Continuing Agreement to the Effect That Dart Would Not Advertise Parke Davis Products at Discount Prices. This Agreement Was a Material Element of the Continuing Conspiracy Which Was Held To Violate the Sherman Act and Such Retaliatory Action Was Designed To Further the Objects of the Conspiracy.

The Supreme Court in its first *United States v. Parke Davis, & Co.* decision made special mention of the "suspension of advertising" scheme employed by Parke Davis as an alternative course of action when adherence to its basic resale price-maintenance scheme began to falter. In August of 1956, Parke Davis representatives sought and received assurances of compliance from the retailers of its products in the District of Columbia that the retailers would not advertise Parke Davis vitamins at less than suggested minimum retail prices. Dart's acquiescence in this plan enabled Parke Davis to receive such assurances from the other retailers.

The Supreme Court specifically condemned this scheme as being beyond the "limited dispensation" of the *Colgate* decision and, therefore, a Sherman Act violation. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). The Court observed:

> "It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy. . . .[i]f a manufacturer. . .takes **affirmative action** to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customer's

> acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product." 362 U.S. at 46-47. (Emphasis supplied)

Dart and others subsequently breached this unlawful agreement.

In view of all of the facts in the instant case, a jury could properly find that the 1957 refusal to deal with Dart was designed to penalize it for its breach of the unlawful agreement. Certainly, affirmative action taken to penalize Dart for its refusal to adhere to that unlawful agreement, and to coerce renewed adherance to it, could lead a jury to conclude that the unlawful conspiracy violative of the Sherman Act was still very much alive. Thus, the District Court erred in granting Parke Davis' motion for summary judgment.

III.

The District Court Erred in Granting Appellee's Motion for Summary Judgment Because a Trier of Fact Could Have Properly Found That the Refusal To Deal Was an Act of Retaliation Against Dart for Cooperation With the United States Government in the Criminal Prosecution of Parke Davis for Violations of the Sherman Act and in the Civil Action Premised on the Same Facts Brought by the Government Against Parke Davis. A Trier of Fact Could Have Properly Found That Such Retaliation Was Designed To Further the Continuing Conspiracy by Providing an Object Lesson of Punishment for Cooperation With the Government and To Remove Dart as an Obstruction to the Success of the Continuing Price Maintenance Conspiracy in Violation of the Sherman Act.

The facts before the District Court indicated that Parke Davis notified Dart of the decision to cut off Dart approximately five weeks after Parke Davis was acquitted in the criminal action brought by the United States Government. The facts also show that the president of

Dart was the key witness for the Government in that proceeding. The record further demonstrates that Dart's president was informed by certain Parke Davis representatives that one of the reasons prompting the refusal to deal further with Dart was to penalize Dart for the role its president had played in the prosecution of the criminal action. It is apparent that the acquittal instilled Parke Davis with false confidence in the legality of its resale price maintenance scheme, which was yet to be condemned by the Supreme Court decision in the Government's pending civil action against it. These circumstances could lead a jury to conclude that the December, 1957 notice of termination was intended to be retaliatory in nature. A jury could find also that in addition to being retaliatory, the act was intended to have the benefit of removing a potential "informer" from the confines of Parke Davis' price maintenance scheme.

Of further significance is the fact that the 1957 cut-off of Dart occurred after the Government's civil action was filed but before it was brought to trial. The president of Dart was the complaining witness in that case, and it was contemplated that he would testify at the trial. Thus, a jury could conclude also that the refusal to deal was intended to exert economic duress upon Dart which might discourage Dart from cooperating further with the Government in its civil action.

Surely the refusal to deal in the case at bar, if sparked by either of the aforementioned motives, does violence to the policy of the Sherman Act and, therefore, runs afoul of its provisions. Indeed, if refusals to deal which are so motivated escape legal sanctions, Government witnesses in antitrust actions and private plaintiffs in civil antitrust suits of this nature will become scarce if not extinct. More important, to the extent that the refusal to deal was designed to minimize the possibility of future cooperation between its dealers and the Government or to force Dart to curtail its assistance to the Government in its

•civil suit, such act was directly in furtherance of the existing unlawful combinations or conspiracies.

A United States Court of Appeals recently commented that in an appropriate case, a court might restrain a defendant in an antitrust suit from attempting to coerce the plaintiff into discontinuing the suit by refusing to deal any further with the plaintiff. *House of Material, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 871, 872 n. 12a (2d Cir. 1962). In that case, which involved an alleged Robinson-Patman Act violation, the Court indicated that such restraint would be similar to a court's exercise of its contempt power to protect the integrity of the judicial system. Subsequently, in another private action alleging a Robinson-Patman Act violation, a different United States Court of Appeals expressly held that the trial court should have granted the plaintiff's request for a preliminary injunction restraining the defendant manufacturer (Parke Davis) from refusing to continue to sell drugs to it, a wholesaler, and its subsidiary during the course of the private antitrust action being brought by the wholesaler. *Bergen Drug Co. v. Parke, Davis & Co., Inc.*, 307 F.2d 725 (3d Cir. 1962). The Court in that case observed:

> "True enough, the defendant can choose customers, but it should not be permitted to do so in order to stifle the main action, especially where it is apparent that such conduct will further the monopoly which plaintiff alleges defendant is attempting to bring about and which, if proved, would entitle plaintiff to permanent relief." 307 F.2d at 727. (Emphasis supplied.)

After discussing the case of *House of Materials, Inc. v. Simplicity Pattern Co., supra*, which denied the request for a preliminary injunction on the facts presented, one writer has cogently observed that upon similar facts in a treble damages suit under the Sherman Act, the

temporary injunction should properly be issued. Comment, *A Simple Refusal to Deal,* 71 Yale L.J. 1565, 1577 (1962).

In the case at bar, Parke Davis' refusal to deal, if motivated by vengeance, fear of future cooperation between Dart and the Government, or an intent to discourage Dart's cooperation with the Government in the Government's civil action, certainly flouts the integrity of our judicial system (See *House of Materials, Inc. v. Simplicity Pattern Co., supra)* and tends to undermine the basic scheme for enforcement of our nation's antitrust laws. More important, a refusal to deal so motivated in this case would further the combination in restraint of trade which was formed in 1956 and continued to exist on the day of the refusal to continue dealing.

The relief sought in the instant case, unlike that sought in the *Simplicity Pattern* and *Bergen Drug* cases, would not entail compulsory continuation of contractual relations. Rather, the relief sought in the case at bar is monetary, in recognition of a past termination of a business relationship pursuant to an unlawful conspiracy resulting in actual money damages. From the facts presented in this case, a jury would be warranted in finding that the refusal to deal for such unlawful purpose was in furtherance of a combination or conspiracy and thus a violation of the Sherman Act. Thus, the District Court erred in granting Parke Davis' motion for summary judgment.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the grant of summary judgment for Appellee was erroneous, and that this ruling should be reversed and the case remanded to the District Court.

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,268

DART DRUG CORPORATION, ET AL., *Appellants,*

v.

PARKE, DAVIS & COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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April 1, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee, the questions are:

1. Where an antitrust treble damage plaintiff, in seeking summary judgment against a manufacturer who refused to deal with him, has represented to the trial court (a) that there were no genuine issues between the parties as to the material facts and (b) that the refusal was not done pursuant to an existing combination or conspiracy, can he appeal from an adverse summary judgment on the ground (a) that there were genuine issues of fact requiring a trial and (b) that at trial he could have satisfied the jury that the refusal to deal was done pursuant to an existing combination or conspiracy?

2. Where the United States has obtained a judgment to the effect that a manufacturer was a party to an unlawful combination or conspiracy which began and ended in the year 1956, may a plaintiff in a subsequent treble damage case ask that the jury be permitted to infer (or presume) from the prior judgment, standing alone, that the same combination or conspiracy was in existence at the end of 1957?

3. In the absence of any collaboration with others, does a manufacturer's unilateral refusal to deal with a particular customer violate the prohibition of Section 1 of the Sherman Act against combinations and conspiracies in restraint of trade?

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IN THE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. The Nature of the Case

This is a private antitrust treble-damage action brought by appellants, a chain of retail drugstores operating in the metropolitan area of Washington, D.C. (and hereinafter collectively referred to as "Dart"), against a drug manufacturer, appellee Parke, Davis & Company. The relevant events, which are described in detail below, may be summarized at the outset as follows:

(1) For two months in the summer of 1956 in metropolitan Washington Parke, Davis collaborated with its customers (including Dart) in a program designed to

discourage the retail advertisement and resale of its products at "discount" prices. The program, which was neither successful nor advantageous to Parke, Davis, was permanently and completely abandoned in the fall of 1956. Ultimately the Supreme Court held, in a civil case brought by the United States, that Parke, Davis' collaboration with its customers in the summer of 1956 had constituted a "combination" in restraint of trade and violated Section 1 of the Sherman Act.

(2) From the fall of 1956 down to the present time Parke, Davis' retail customers in metropolitan Washington (with the qualified exception mentioned in (3) below) have been regularly and continuously purchasing Parke, Davis products and advertising and reselling them at discount prices without any interference from Parke, Davis. Since 1956 Parke, Davis has made no effort, through collaboration with customers or otherwise, to maintain resale prices except in Fair Trade states.

(3) On December 12, 1957—well over a year after the cessation of the illegal "combination" of 1956—Parke, Davis unilaterally and independently decided that it no longer wanted to do business with Dart and permanently closed Dart's account. It is this act that is the subject of this lawsuit. Dart alleges that the 1957 refusal to deal itself violated Section 1 of the Sherman Act and caused losses of profits for which Dart is entitled to receive treble damages.

It is Parke, Davis' position that its 1957 refusal to deal was a lawful exercise of a manufacturer's normal privilege to deal or not to deal with anyone for reasons sufficient to itself. Since the 1957 refusal to deal was not attended by any circumstances which might have

rendered it unlawful (for example, an attempt to monopolize or unlawful collaboration with others), that unilateral act could not have violated Section 1 of the Sherman Act. Accordingly, Dart has not stated a claim upon which treble-damage relief can be granted, and the District Court properly entered summary judgment for Parke, Davis.

Despite the relative simplicity of the case as presented to the District Court below, the matter has been complicated in this Court by the fact that counsel for Dart in the proceedings below withdrew after the entry of judgment and were succeeded by new counsel on this appeal. Since Dart's new counsel have misconceived the posture of the case and have taken positions which are inconsistent with those Dart took below, a principal burden of this brief must be to straighten out the confusion as to what actually happened in the District Court.

B. The State of the Record

As indicated above, this case was preceded by litigation between the appellee and the United States. In May 1957 the Government instituted companion criminal and civil cases charging that Parke, Davis violated Section 1 of the Sherman Act (15 U.S.C. § 1) in July and August 1956. A judgment of acquittal was entered in the criminal case in November 1957 (J.A. 80), but the civil case culminated in a judgment against Parke, Davis on April 16, 1961 (J.A. 15). In bringing this treble-damage action in January 1962, Dart expressly invoked Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)),[1] asserting in effect that they

[1] See Dart's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, pp. 14-15.

should be permitted to present the Government civil judgment as prima facie evidence of propositions of fact as to which the parties to the Government case (the United States and Parke, Davis) would be estopped by the judgment. In substance Dart's position in the court below was this: that the Government judgment proved, prima facie, that Parke, Davis had been a party to an illegal combination or conspiracy in 1956; that as a matter of law this proof also established the illegality of Parke, Davis' 1957 refusal to deal with Dart; and that Dart must therefore be entitled to damages for injury resulting from that unlawful act (see J. A. 108). In short, Dart claimed that the Government judgment alone established Parke, Davis' liability in this case.

The availability of the Government judgment for evidentiary use did not foreclose Dart from bolstering its claim as to liability by alleging and proving facts not shown by the findings in the Government case, but in fact Dart elected not to do so. Placing its entire reliance on the record in the Government litigation, Dart moved for summary judgment on liability without engaging in any pretrial discovery.[1] At the hearing on its motion Dart's counsel expressly stated that the facts upon which he relied to establish liability, and to refute Parke, Davis' defense, were to be found in the record in the Government case.[2]

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[1] Dart sought summary judgment only on the question of Parke, Davis' liability for the 1957 refusal to deal. The question of damages was reserved for subsequent litigation.

[2] Counsel for Dart below never referred at any time to any facts dehors the Government record and judgment. He took the position that "the facts [as to liability] have already been established in this record" (J.A. 100) and that "the facts upon which this question must be resolved are in this record" (J.A. 108).

Having ascertained through discovery that Dart was relying exclusively upon the record and judgment in the Government case, Parke, Davis also moved for summary judgment on the issue of liability.[1] In so doing, Parke, Davis did not challenge any of the findings in the Government case or any part of the Government judgment itself. It simply took the position that the facts established therein did not make out a case for treble damage relief under the antitrust laws. Moreover, both parties expressly represented to the District Court below, in response to that court's questions, that the question of liability did not involve any issue of fact requiring a trial (see J.A. 85, 99, 100, 108). As presented below, therefore, the issue of liability in this case was in an entirely appropriate posture for resolution on cross-motions for summary judgment.

C. The Nature of the 1956 Conspiracy

There is no substantial dispute between the parties here as to the nature of the conduct which was held in the Government case to have violated the Sherman Act. The record and judgment in the Government litigation show, in brief,[2] that in the period prior to July 1956 Parke, Davis was selling its pharmaceutical products in the Washington metropolitan area both to retail drug firms, including Dart, and to wholesalers who in turn resold to the retailers. In the same period Parke, Davis distributed a catalogue listing suggested minimum retail prices which the retailers were encouraged to observe. In the spring or early summer of

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[1] In point of time Parke, Davis' motion was filed first and was immediately followed by Dart's cross-motion.

[2] This description, which is intended to be non-controversial, is based, for reasons of convenience, upon the opinion in United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

1956 a number of retailers began to advertise and sell Parke, Davis products at "discount" prices, and in July 1956 Parke, Davis responded by instituting a sales program to discourage the discounting.

Basically the program consisted of notifying the trade that Parke, Davis would not sell its products directly to retailers who discounted its products and that it would not sell to wholesalers who in turn resold Parke, Davis products to discounting retailers, and for brief intervals in July and August 1956 some retailers were cut off from their sources of supply. In addition, at Parke, Davis' behest, some retailers for a brief time abstained from advertising Parke, Davis products at discount prices.

It is undisputed that these relationships between Parke, Davis and its customers in the two months of July and August 1956 were later held by the Supreme Court in the Government civil case to have constituted an unlawful combination in restraint of trade in violation of Section 1 of the Sherman Act. *United States* v. *Parke, Davis & Company,* 362 U.S. 29 (1960). The essence of the Supreme Court's holding was that in inducing the wholesalers and the retailers to cooperate in temporarily bringing the discount advertising and sales to a halt, "Parke, Davis created a combination with the retailers and the wholesalers and violated the Sherman Act." 362 U.S. at 45.

D. The Termination of the 1956 Conspiracy

1. Dart's Position Below

In the proceedings below, after a brief period of confusion, counsel for the two parties reached an agreement as to when the 1956 combination came to an end. Initially Dart claimed in its complaint and answers to

interrogatories that the combination or conspiracy found by the Supreme Court had continued in existence beyond the year 1956 (J.A. 9, 32), but when opposing counsel pointed out that the record in the Government case was to the contrary (see pp. 8-10 *infra*), Dart completely abandoned its initial position. Thenceforth it expressly agreed that the conduct condemned by the Supreme Court as an illegal combination had come to a halt in September 1956. These are the words of Dart's counsel at the hearing on the cross-motions for summary judgment:

> "In September 1956 Parke, Davis discontinued its activities of causing the wholesalers not to sell. We will just summarize that by saying *they discontinued the activity which was subsequently determined to be illegal in the form of a combination.*" (J.A. 101; emphasis supplied).[1]

The principal difference between the parties on this appeal arises from the fact that Dart's new counsel have inadvertently overlooked the foregoing position stated by Dart's counsel in the District Court. Dart here argues that it has always contended that the 1956 combination or conspiracy continued to exist in 1957 and later years (see Brief for Appellants, pp. 11-13), but the argument is incorrect both as a statement of Dart's claim and as a statement of the events shown by the record.

2. The Findings In the Government Litigation

In the Government civil case, in which the plaintiff sought an injunction against Parke, Davis' 1956 conduct under Section 4 of the Sherman Act (15 U.S.C.

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[1] See also the statement by Dart's counsel that "the truth is that *until late August 1956* the combination existed" (J.A. 101; emphasis supplied).

§ 4), the District Court dismissed the complaint at the close of the Government's evidence. On appeal the Supreme Court held, as indicated above (p. 6), that the 1956 conduct was unlawful and reversed and remanded for further trial both on the merits and on the question of injunctive relief. Trial was resumed in the District Court in June 1960, and at that trial Parke, Davis elected to forego any defense on the merits. But it also elected to present evidence to show that injunctive relief in the circumstances was not appropriate on the ground that the unlawful conduct had come to a complete and permanent halt in the fall of 1956.

Accordingly, *after* the Supreme Court's decision on the merits, the Government and Parke, Davis litigated the precise question whether the combination or conspiracy which existed in July and August 1956 had come to an end at that time or whether it had continued in existence. Having heard the proof, the District Court entered extensive findings of facts on that precise issue. Because of the importance of these findings in this appeal, they are set out verbatim in a separate appendix of this brief (pp. 37-41 *infra*); we will simply summarize them here:

1. In the fall of 1956 Parke, Davis concluded, on the basis of its practical experience in July and August 1956, that its program for maintaining resale prices was ineffective and would not be effective in the future (Finding No. 3, p. 38 *infra*).

2. Also in the fall of 1956 Parke, Davis discovered that its leading competitors were making no effort to maintain resale prices, and on this basis Parke, Davis concluded that such an effort by Parke, Davis in the

future "would not only fail to accomplish its purpose but would actually subject Parke, Davis products to a competitive disadvantage" (Finding No. 3, p. 38 *infra*).

3. Shortly thereafter the company affirmatively decided to terminate any effort to maintain resale prices in non-Fair Trade areas and gave appropriate instructions to Parke, Davis' field personnel (Findings 4 and 5, pp. 38-39 *infra*).

4. These decisions and instructions were made and given more than three months before the Government had instituted any legal action against Parke, Davis' price maintenance activity and were not prompted by any action of the Government (Finding No. 6, p. 39 *infra*).

5. "At no time since January 1957 . . . has Parke, Davis considered or taken any action to reestablish the sales policy hereinbefore described or to discourage, by refusals to sell or otherwise, the retail sale or advertisement of Parke, Davis products at less than suggested retail prices in non-Fair Trade areas." (Finding No. 7, p. 39 *infra*).

6. Since that time Parke, Davis has regularly and continuously been selling its products "to retail drugstores which were and are selling and advertising Parke, Davis products" at discount prices and to wholesalers who were and are supplying such retailers. During the same period retail drugstores in the Washington area have been regularly and continuously advertising and selling Parke, Davis products at discount prices (Findings 8 and 9, pp. 39-40 *infra*).

7. The foregoing "regular and continuous" advertisement and sale of Parke, Davis products at discount

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7. The foregoing "regular and continuous" advertisement and sale of Parke, Davis products at discount

prices since 1956 "has in effect served as a *public announcement* that Parke, Davis products may be sold and advertised without interference by Parke, Davis." (Finding No. 13, p. 40 *infra;* emphasis supplied).[1]

8. The price maintenance activity which was condemned by the Supreme Court "lasted for only two months (July and August 1956)". (Finding No. 12, p. 40 *infra*).

Appellants' brief implies, rather indirectly, that in the Government litigation, in some undefined way, doubt was cast upon the validity of the foregoing findings. The fact is otherwise. After making the findings the District Court in the Government case did two things: (1) relying on these findings, it quite correctly denied the Government's request for injunctive relief; and (2) it made the technical error of not entering a judgment declaring the fact of Parke, Davis' 1956 violation of the Sherman Act. The Government then took the case back to the Supreme Court but on a very limited ground. It did *not* appeal from the denial of injunctive relief or seek reversal of the underlying findings; it asked only that the Supreme Court direct the District Court to rectify its technical error by entering a judgment on the merits. The Supreme Court acted accordingly. Without in any way sug-

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[1] This finding disposes of Dart's unsubstantiated allegation, presented for the first time on this appeal, that prior to December 12, 1957, Parke, Davis "had not undertaken any affirmative act of abandonment" of the 1956 conspiracy. Brief for Appellants, p. 16. The Supreme Court was not aware of the fact subsequently established in this finding when it remarked that the record before it did not show "that Parke, Davis has announced to the trade that it will abandon the practices we have condemned." 362 U.S. at 47-48 (quoted in Brief for Appellants, pp. 6, 16).

gesting that the trial court's findings and conclusion as to injunctive relief were erroneous,[1] it simply directed the entry of a judgment declaring that the 1956 violation had occurred. *United States* v. *Parke, Davis & Company,* 365 U.S. 125 (1962). Accordingly, the foregoing findings, upon which an important element in the final disposition of the case was based, are as valid today as they were when made.[2]

E. The 1957 Refusal to Deal

With the end of the "combination" in September 1956, Dart, like the other local retailers, recommenced its regular practice of advertising and selling Parke, Davis products at discount prices, and Parke, Davis continued to sell to Dart on a regular basis without in any way attempting to interfere with these practices (J.A. 18, 101, 102). But on December 12, 1957, Parke, Davis wrote a letter to Dart stating that it would no longer sell directly to Dart and that it was

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[1] Indeed, the Supreme Court in 1961 speculated as to the possibility of a "resumption by Parke, Davis of illegal activity", 365 U.S. at 126, thus indicating agreement with the District Court's conclusion that the illegal conduct had ceased.

[2] Although these 1960 findings obviously do not contain any reference to conditions between 1960 and 1964, this Court may think it appropriate to take judicial notice of the fact that today, in the course of a given week, virtually every major drug retail firm in the area, including Dart, publishes advertisements in the leading Washington newspapers and expressly offers to sell Parke, Davis products at discount prices. This practice has been going on continuously ever since August 1956. Parke, Davis simply has not engaged in any resale price maintenance from 1956 to the present day.

permanently closing Dart's account.[1] Since that time Dart has continued to buy Parke, Davis products from wholesalers in the District of Columbia, and to advertise and sell them at discount prices (J.A. 5, 10, 18, 50, 98; see p. 11 *supra*), but it has been unable to buy such products directly from the manufacturer. Dart's claim in this case is that its inability to buy direct from Parke, Davis has caused a loss of profits which Dart would otherwise have earned in 1958, 1959, 1960, and 1961; no damages are claimed for any period prior to 1958 (J.A. 44).

With respect to the alleged illegality of Parke, Davis' 1957 action, one additional fact should be noted. In 1960, at the time of the Supreme Court's decision on merits, that court was aware that Parke, Davis had been steadily refusing to deal with Dart since December 12, 1957 (see 362 U.S. at 36, note 5), and the Government and the District Court were also aware of that fact. Yet in June 1960, when trial was resumed in the District Court after the remand, the Government did not ask the District Court to enjoin Parke, Davis' continuing refusal to deal with Dart, and the District Court did not do so. Moreover, when the Government

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[1] The letter, which was stipulated into the record by the parties in the court below (J.A. 113-14), read as follows:

"December 12, 1957

"Dart Drug Co.
18th and Columbia Road
Washington, D.C.

Dear Sirs:

We have concluded that we do not wish to have any further business relations with Dart Drug Company. We are therefore closing your account permanently, effective immediately.

Yours very truly, Parke, Davis & Company,
By Kenneth D. McGregor, Vice President,
Secretary and General Attorney."

appealed to the Supreme Court for the second time, it did not suggest that Parke, Davis' continuing refusal should be enjoined, and neither did the Supreme Court. Indeed, the Supreme Court itself expressly indicated in 1961 that it did not consider that Parke, Davis was then violating the law (see n. 1, p. 11 *supra*). It thus appears that none of the three agencies involved—the Government, the District Court, or the Supreme Court of the United States—considered that Parke, Davis' continuing refusal to deal with Dart was itself an unlawful act.

F. Parke, Davis' Motive in Refusing to Deal in 1957

Dart's initial position in the proceedings below was confused on the question of Parke, Davis' motive in refusing to deal with Dart in December 1957. Initially Dart claimed a variety of motives including vengeance, retaliation, and a desire to punish Dart for assisting the Government in its litigation against Parke, Davis. But when it came time for Dart to spell out its position on its motion for summary judgment, and the court specifically questioned Dart's counsel as to his claim with respect to Parke, Davis' motive in December 1957, the following colloquy took place:

> "THE COURT: Now what are you trying to show, that as a matter of fact there was a hidden motive?
>
> "MR. CROWLEY: I am trying to show that throughout the theme of this case the seeking for a remedy for the deep discounting of Dart was *the whole purpose* of Parke, Davis' activities . . . ." (J.A. 107-108; emphasis supplied).[1]

[1] See also Dart's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, which opens with the theme that in 1956 and in *1957* Parke, Davis' motive was "to find a *remedy* to 'deep price cutting by retailer Dart Drug Com-

In short, Dart's final position in the District Court below was that Parke, Davis had cut off Dart in December 1957 because of Dart's continuing price-cutting of Parke, Davis products (a practice, incidentally, which Dart has continued down to the present time, with respect to wholesaler-supplied products, without interference from Parke, Davis; see p. 12 *supra*).

The foregoing claim was not disputed by Parke, Davis. For the purposes of the summary judgment motions counsel for Parke, Davis expressly conceded, *arguendo,* both in its motion papers and on oral argument (J.A. 93), that Parke, Davis' motive in 1957, as in 1956, was to inhibit and discourage Dart's discounting. There was thus no issue of fact on the question of motive, and the court accepted the agreement of the parties on this subject.[1]

G. The Unilateral Character of the 1957 Refusal to Deal

A factual issue which might have been raised in the court below was the question whether, in deciding to terminate its business relations with Dart in December 1957, Parke, Davis was acting in active collaboration with anyone else. The Government record contains a

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pany' " and that Parke, Davis did "find a *remedy* in the form of the 1957 cutoff" (p. 1; the emphasis is Dart's). Similarly, in its opposition to Parke, Davis' cross-motion Dart stated its claim as follows:

> "The plaintiffs assert that *the reason* for the 1957 cutoff was to assert economic pressure on the plaintiffs to minimize its price cutting practices." (p. 5; emphasis supplied).

[1] The court orally stated to Dart's counsel, without any disagreement from him, that:

> "I think I should assume that the motive of Parke, Davis was the same in 1957 as it was in 1956—namely, to try to cut off Dart because they were reducing prices . . . ." (J.A. 109)

specific unchallenged finding that in 1957 "Parke, Davis' action in ceasing relations with Dart was a purely unilateral one" (164 F. Supp. at 834).[1] In addition, in its answers to interrogatories below, Dart disavowed any claim that the 1957 refusal to deal was done by agreement with anyone else (J.A. 46). And in its argument on its summary judgment motion Dart's counsel expressly conceded that the refusal to deal was not undertaken in concert with anyone else (J.A. 110). As the court below stated without disagreement from Dart's counsel,

> "The Court inquired of counsel for the plaintiff whether there was any claim here that there was any concerted action subsequent to December 12th, 1957, or in conjunction with the action of that date. With commendable candor plaintiff's counsel answered in the negative." (J.A. 116).[2]

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[1] Although on its appeal to the Supreme Court on the merits of the case the Government challenged a number of the District Court's findings with respect to Parke, Davis' 1956 conduct, and although the Supreme Court in effect set aside a number of those findings, the specific finding with respect to Parke, Davis' conduct in 1957 was not questioned either by the Government or by the Supreme Court.

[2] On this appeal Dart laboriously argues that, because the court's question was phrased in terms of concert of action "between Parke, Davis and the wholesalers" (J.A. 110), the negative answer of Dart's counsel left open the possibility of a claim that the 1957 refusal to deal was undertaken by Parke, Davis in concert with other *retailers*. (See Brief for Appellants, pp. 12-13). The argument is simply unrealistic. At no time, either in its motion papers or on the oral argument on its motion for summary judgment, did Dart ever suggest that its claim of illegal conduct in 1957 was based upon any separate collaboration between Parke, Davis and other retailers, and when the court made the oral statement quoted above in the text, Dart's counsel made not the slightest objection.

H. The Possibility of a "Fresh" Conspiracy in 1957

There are portions of appellants' brief which could be read as suggesting indirectly that, although the 1956 conspiracy ended in that year, Parke, Davis in 1957 formed a "fresh conspiracy" pursuant to which it refused to deal with Dart. (See particularly clause (b) in Point I of Statement of Points, p. 8, and corresponding later statements). No extended discussion of such a possible "fresh" 1957 conspiracy is necessary here, however, because other portions of appellants' brief go to some lengths to make clear (1) that Dart did not claim below that a fresh conspiracy was formed in 1957 and (2) that Dart does not claim so here:

> "Dart has never contended that a fresh conspiracy was formed in 1957. Dart's contention is that the 1956 conspiracy continued to exist in 1957." Brief for Appellants, p. 12.

Although the second sentence quoted above is inconsistent with the position which Dart took below, at least it is clear that there is no claim of a "fresh" 1957 conspiracy with which this Court need be concerned.

I. The Legal Contentions of the Parties Below and the Decision of the District Court

In the court below Dart's theory of liability was roughly as follows: that in 1956 Parke, Davis had taken unlawful action to prevent price cutting by Dart and others; that in 1957 it had taken independent action to prevent price cutting by Dart alone; that "the seeking for a remedy for the deep discounting of Dart" (J.A. 108) was thus a continuing "theme" or "thread" which "flowed" through the entire two-year

period (J.A. 96-97, 100); and that since Parke, Davis had "been found guilty of these [1956] violations, it logically follows that the cut-off of 1957 is the direct result of that activity" (J.A. 108). In short, as the District Court summarized it, Dart's position was that because the 1956 combination was illegal, "therefore the unilateral action [of 1957], even though it was not taken in concert with anyone else, must be deemed to have been a product of the original combination" (J.A. 117).

Parke, Davis' position, on the other hand, was that, since the 1956 combination had admittedly come to an end in 1956, and since Dart had not alleged any new collaboration or unlawful concerted action in 1957, Parke, Davis' simple unilateral refusal to deal with Dart did not constitute a violation of the Sherman Act's prohibition against combinations or conspiracies with others, even assuming *arguendo* that Dart's price-cutting was the reason for the 1957 refusal to deal.

Presented with these arguments the District Court denied Dart's motion for summary judgment on liability and granted Parke, Davis' cross-motion. It held that under *United States* v. *Colgate & Co.*, 250 U.S. 300, as clarified in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, "a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act" (J.A. 116). The Court recognized that the 1957 cutoff could conceivably have injured Dart in the sense that from that time forward Dart had had to purchase Parke, Davis products from wholesalers who charged somewhat more than Parke, Davis (J.A. 116), but it held that that fact alone, in the absence of an antitrust

violation, did not give rise to a claim for treble damages. The Court concluded as follows:

> "The mere fact that a person has violated the law on one occasion is no proof that some later action of his, which on its face is not a violation of law, must be tainted with the illegality of the prior act." (J.A. 117).

STATUTE INVOLVED[1]

15 U.S.C. § 16

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: . . . .

SUMMARY OF ARGUMENT

In presenting their claims in their final form on the cross-motions for summary judgment, appellants made a number of representations as to their position in the District Court below, including (1) that the case, as presented, did not involve any genuine issues of material fact requiring a trial; (2) that the illegal "combination" condemned by the Supreme Court had in fact been "discontinued" in 1956; and (3) that "the whole purpose" of appellee's 1957 refusal to deal was to remedy appellants' price cutting. The District Court having entered summary judgment in the reliance upon those representations, appellants cannot now attack the judgment by asserting a position, on

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[1] Consonant with the Rules of this Court, Rule 17(c)(4), Section 1 of the Sherman Act, 15 U.S.C. § 1, is not included herein.

each of these three issues, which is completely inconsistent with the representations below.

Where the Government has obtained a judgment to the effect that an antitrust defendant was a party to an unlawful conspiracy in a specified year, a plaintiff in a subsequent treble damage suit is not entitled to ask the trier of fact to "infer", solely from that judgment, that the defendant was a party to an unlawful conspiracy in some subsequent year. Indeed, unless independent proof of a conspiracy in the subsequent year is presented, the Government judgment is inadmissible in the treble-damage case. Accordingly, having abstained from alleging matters not shown in the Government judgment in this case, appellants cannot now ask that a jury be permitted to "infer" (or "presume") the existence of a 1957 conspiracy solely from the Government judgment that a conspiracy existed in 1956.

Section 1 of the Sherman Act, which condemns contracts, combinations, and conspiracies in restraint of trade, necessarily contemplates collaboration or concerted action between the defendant and others. It follows that where a manufacturer, acting unilaterally and without any collaboration or agreement with others, exercises his privilege not to have further dealings with a particular customer, his refusal to deal cannot violate the statute, regardless of the motive which prompted the refusal. In this case, therefore, it is completely irrelevant whether appellee, in refusing to deal with appellants, was seeking to "remedy" appellants' price-cutting or was "retaliating" for earlier antitrust complaints. The refusal to deal, having been wholly free of collaboration with others, did not violate the Sherman Act and provides no basis for a treble-damage claim.

ARGUMENT

I. APPELLANTS, HAVING MADE CERTAIN STATEMENTS OF POSITION ON WHICH THE COURT BELOW RELIED, CANNOT NOW ATTACK THE DECISION BELOW BY ASSERTING NEW CLAIMS WHICH ARE INCONSISTENT WITH THE PRIOR REPRESENTATIONS

At the hearing on the cross-motions for summary judgment the District Court made an effort clearly to understand Dart's position on (among others) each of three specific points. On each point Dart's counsel made an express representation as to its position, and the record shows that the court relied on each of the three representations in reaching its decision. Yet in this Court Dart attacks that decision by asserting claims which are squarely inconsistent with Dart's previous statements. Since there must be an end to litigation, these new claims should not be heard on this appeal.

A. Dart Has Now Reversed Its Position Below and Asserted for the First Time That the Government Record Upon Which It Relies Raises Genuine Issues of Fact Requiring a Trial

As indicated above (p. 4), Dart specifically represented to the District Court that all of the facts upon which it relied were established by the findings in the record in the Government litigation. It represented that the only question before the court was a question of law and that no issue of fact was raised by either motion (see J.A. 99, 100, 108). And when the court suggested that Dart's contentions might raise a genuine issue of fact, Dart protested that that was not so:

> "THE COURT: That is a question of fact. If something you say is a direct result of something else, that is a factual question, isn't it?

> "MR. CROWLEY: But the facts have already been established in this record, Your Honor. The record has already established these facts. The Supreme Court's opinion and the final judgment of the District Court. . . ." (J.A. 100).

On the basis of counsel's several statements on this subject the court concluded that there was no issue of fact requiring a trial (J.A. 110, 115).

Yet on this appeal Dart reverses its position and says that "there were genuine issues of fact" and that the District Court erred in disposing of the matter in summary fashion (Brief for Appellants, p. 13). There being no justification for the reversal of position, this suggestion of error must be set to one side.

B. Having Represented to the District Court That the Unlawful Combination Found By the Supreme Court Was Discontinued in September 1956, Dart Cannot Now Allege as a Factual Conclusion That the Combination Continued to Exist in the Following Year

Dart's counsel in the proceedings below expressly stated to the District Court that the 1956 combination condemned by the Supreme Court had been "discontinued" in September 1956 (see p. 7, *supra*). In addition, when the District Court inquired whether Dart contended that any unlawful concert of action occurred in 1957, Dart's counsel said that he did not so claim (see p. 15 *supra*). When explaining its position to the District Judge, Dart never mentioned any concept of "continuing conspiracy",[1] and the District Court

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[1] The only "continuity" claimed by Dart in its argument was a continuity of motive on the part of Parke, Davis. See pp. 16-17 *supra*.

in its opinion squarely relied upon Dart's representations to the contrary (J.A. 116).[1]

In this Court, however, Dart's entire position throughout its brief is specifically premised upon the existence of a "continuing conspiracy" in 1957. Aside from the fact that the contrary was conceded by counsel and is proved by the record, Dart should not now be permitted to urge—as the basic proposition upon which its entire position depends—a factual conclusion which could easily have been, but was not, brought to the District Court's attention at the proper time.

C. Dart Now Improperly Seeks to Attribute to Parke, Davis a Variety of Motives Which Could Have Been, But Were Not, Called to the Attention of the District Court

In its voluminous and rambling pleadings in the District Court (see n. 1 this page), Dart set out, directly and indirectly, many allegations with respect to the reasons which might conceivably have motivated Parke, Davis when it refused to deal with Dart in 1957. But when Dart's counsel rose to argue the summary judgment motions before the District Court, the only motive specifically claimed with respect to the 1957 refusal to deal was an alleged desire of Parke, Davis (said to be its "whole purpose") to find a rem-

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[1] It is no answer to say that at a number of points in the 112 pages of Dart's pleadings (including the complaint, answers to interrogatories, and summary judgment papers) there are references to a "continuing conspiracy". Even assuming that a busy motions judge could have been expected to consider every allegation and argument made in these lengthy and rambling pleadings, counsel's affirmative statement at the hearing that the conspiracy had ended in 1956 would have required the court to exclude the "continuing conspiracy" concept from its consideration.

edy for Dart's price cutting—a motive which counsel for Parke, Davis conceded *arguendo* (see p. 14 *supra*). Since Dart's counsel did not claim either that other motives were shown by the findings in the Government case or that they could be "inferred" from that record, the District Court expressly proceeded on the assumption, without objection from Dart, that Parke, Davis' motive was, as stated, to remedy Dart's price-cutting (J.A. 109).

Under these circumstances it is not permissible for Dart now to allege, as it does, a variety of other motives which it thinks might have prompted Parke, Davis to refuse to deal with Dart. Although as a matter of law the question of motive is wholly irrelevant to the issue whether there was a violation of the Sherman Act in 1957 (see p. 32 *infra*), the new motive allegations are beside the point for the further reason that they were not properly brought to the attention of the trial court.

II. GIVEN APPELLANTS' EXCLUSIVE RELIANCE UPON A GOVERNMENT JUDGMENT SHOWING THE EXISTENCE OF A CONSPIRACY IN 1956, A JURY COULD NOT HAVE BEEN PERMITTED TO "INFER" FROM THAT JUDGMENT, STANDING ALONE, THAT A CONSPIRACY EXISTED IN 1957

Having offered the prior Government judgment as prima facie evidence under Section 5(a) of the Clayton Act, Dart takes the position in this Court that, if the case had gone to trial before a jury, the jury could have properly "inferred" certain factual conclusions from the matters established prima facie by the Government judgment. Thus they repeatedly contend, as the basic premise of their entire case, that "a jury could have properly inferred" from the findings in the Government case that the 1957 refusal to deal was an

act in furtherance of a conspiracy which was in existence in that year (see Brief for Appellants, pp. 16, 17, 18).

There is a substantial body of case law dealing with the precise question of the inferences which a trier of fact in a treble damage case can properly draw from a prior Government judgment. In these cases, typically, the plaintiff has offered, under Section 5(a), a Government judgment establishing prima facie that the defendant had been a party to an unlawful conspiracy in a period of time *prior* to the period in which the treble damage plaintiff allegedly sustained its injury. In each such case it has been held that unless the plaintiff has presented independent evidence to show that a conspiracy existed in the subsequent period of time, the prior Government judgment is irrelevant and inadmissible on that ground. The reasoning underlying this rule was clearly stated in *Eagle-Lion Studios* v. *Loew's, Inc.*, 248 F.2d 438 (2d Cir. 1957), *aff'd per curiam*, 358 U.S. 100 (1958), in which the Court of Appeals for the Second Circuit held that a Government judgment which prima facie proved the existence of conspiracy in 1945 did not by itself prove the existence of a conspiracy in 1946:

> "In determining, under that section [Section 5(a) of the Clayton Act], the effect of a judgment in a prior antitrust suit *it is not our function to consider inferences, whether reasonable ones or not, that might be drawn from the language of the prior judgment.* Under Section 5 a judgment in a prior suit is *prima facie* evidence 'as to all matters respecting which said judgment * * * would be an *estoppel as between the parties thereto* * * *' (Emphasis added.) *Thus, in construing a prior judgment for purposes of this statute, the court*

> *in the subsequent action does not sit as a trier of fact, i.e., it does not have wide license to draw inferences from the judgment and record in the prior litigation.* Rather, the court is circumscribed by the relatively narrow limits of the doctrine of estoppel . . . [which] extends only to questions 'distinctly put in issue and directly determined' [in the Government suit]. Emich Motor Corp. v. General Motors Corp., 1951, 340 U.S. 558, 568-569 . . ." 248 F.2d at 444 (emphasis supplied).

These limitations upon the evidentiary use of the Government judgment are based upon at least two considerations. First, it is recognized that evidence that a defendant has engaged in illegal conduct on one occasion is not relevant to the question whether he has violated the law at some subsequent time. It is also recognized that evidence of the prior violation creates the possibility of prejudice in the mind of the trier of fact in the subsequent case. Thus, in the recent case of *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315 F.2d 449, 459-60 (1st Cir.), *cert. denied* 375 U.S. 820 (1963), in which a treble damage plaintiff offered a Government judgment of violations in 1938-1951 in order to prove the existence of violations in 1952-1956, the Court of Appeals for the First Circuit excluded the Government judgment, emphasizing the following considerations:

> "It is of course well settled that evidence that defendant had, in the past, committed illegal acts is not admissible to show that he has a proclivity towards similar wrongs in a subsequent proceeding . . . If [the plaintiff] does not have . . . independent evidence [of a violation at the time charged in the complaint], we do not believe that he should be able to use the prior judgment as a crutch in the attempt to supply the essential

> elements of his action. It would be subversive of the purpose of Section 5 to permit the introduction of a prior decree or judgment 'merely for its aura of guilt, or to imply new wrongdoing from past wrongdoing.' Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629, 632 (2d Cir. 1952), cert. denied 344 U.S. 875. . . ."

It follows, therefore, that "[w]hatever is crucial to the treble damage case and is not *distinctly determined* in the previous Government suit must be proven by direct evidence." *Eagle-Lion Studios* v. *Loew's, Inc. supra*, 248 F.2d at 244.

These principles are as applicable in a treble damage case which is to be tried to a jury as they are to a case to be tried to the court. *In Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954), in which a treble damage plaintiff sought to prove the existence of a 1949 conspiracy by offering prior Government judgments of an unlawful conspiracy in 1945-1948, the trial judge instructed the jury that, in the absence of additional evidence to show that the conspiracy had continued, those judgments could not be considered as evidence of a conspiracy in 1949. See 346 U.S. at 543-544. The plaintiff objected to the instruction on the ground that it prevented the jury from giving any weight to the Government judgments, but the Supreme Court expressly approved the trial court's charge. It held in effect that a jury is not entitled to infer the existence of a conspiracy in 1949 from a Government judgment establishing that a conspiracy existed in the preceding year. Similarly, in *Park Neponset Corp.* v. *Smith*, 248 F.2d 452 (1st Cir. 1958), in which a treble damage plaintiff was seeking to prove the existence of a conspiracy in 1947, Judge

Wyzanski had refused to let the jury consider a Government judgment showing that the defendant had been a party to an unlawful conspiracy in 1945, relying upon *Theatre Enterprises, supra.* His ruling was unanimously affirmed by the Court of Appeals for the First Circuit. And in the very recent case of *Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.*, 327 F.2d 365 (5th Cir. 1964), where the issue was the existence of a conspiracy in 1952, the District Court excluded from the jury's consideration a Government judgment showing a conspiracy in 1945. In unanimously affirming, the Court of Appeals for the Fifth Circuit held that the Government judgment was properly excluded in the absence of any independent evidence of a 1952 conspiracy.

The same limitations upon the use of prior Government judgments have been applied in this jurisdiction. In *Orbo Theatre Corp.* v. *Loew's Inc.*, 156 F. Supp. 770 (D.D.C. 1957), *aff'd per curiam,* 104 U.S. App. D.C. 262, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 943 (1959), where the issue was the existence of a conspiracy in 1955, the District Court below refused to give any evidentiary effect to prior Government judgments showing a conspiracy in 1950. It said:

> "Such a decree . . . is *prima facie* evidence only as to matters actually determined and does not extend to all issues that might have been adjudicated . . . It should be emphasized that . . . the decree is *prima facie* evidence only of a conspiracy governing the same area and existing *during the same time* as that involved in the case on trial." 156 F. Supp. at 776-777 (emphasis supplied).

See also *Webster Rosewood Corp.* v. *Schine Chain Theatres,* 263 F.2d 533 (2d Cir.), *cert. denied,* 360

U.S. 912 (1959); *Robbinsdale Amusement Corp.* v. *Warner Bros. Pictures Distrib. Corp.*, 141 F. Supp. 134 (D. Minn. 1955).

In view of this uniform line of cases, and in the absence of any evidence of conspiracy apart from the Government judgment, there was no basis upon which the District Court below could have permitted a jury to infer that Parke, Davis was a party to an unlawful conspiracy in 1957. This defect in Dart's position, moreover, would exist even if the Government record did not contain specific findings that the 1956 conspiracy ended in 1956. In none of the cases discussed above, so far as the opinions disclose, did the record contain affirmative proof that the conspiracy shown by the Government judgment had ended prior to the period of time involved in the treble damage case; yet in each such case it was held that the prior Government judgment was not evidence of a conspiracy in the period in issue. *A fortiori*, in the present case, where the Government record affirmatively shows that the conspiracy involved in the Government case had come to an end more than a year before the plaintiff's alleged injury occurred, the suggested "inference" of a continuing conspiracy in subsequent years is completely untenable.

III. APPELLANTS' SHOWING OF A 1956 CONSPIRACY, BASED SOLELY ON A GOVERNMENT JUDGMENT OFFERED UNDER SECTION 5(a) OF THE CLAYTON ACT, DOES NOT GIVE RISE TO A LEGAL "PRESUMPTION" THAT THE CONSPIRACY CONTINUED IN 1957, AND, IN ANY EVENT, ANY SUCH "PRESUMPTION" IS NEGATED ON THIS RECORD

The cases discussed in the preceding section of this brief effectively dispose of another contention, raised by appellants for the first time in this Court, that the Government judgment of a 1956 conspiracy raises a rebuttable legal "presumption" that the conspiracy continued from year to year thereafter (Brief for Appellants, pp. 16-17). The "narrow limits of the doctrine of estoppel", which are expressly embodied in Section 5(a) of the Clayton Act, simply do not permit any such evidentiary use of the judgment, either by way of a theoretical "presumption" or otherwise, in the absence of independent evidence that a conspiracy existed in 1957.

Furthermore, appellants' own statement of the so-called "continuing conspiracy" presumption acknowledges that the doctrine, even where applicable, is subject to a sharp qualification: the presumption is rebutted and automatically destroyed by a showing of prior "affirmative action" to terminate the conspiracy (Brief for Appellants, pp. 16-17). Given evidence of "some affirmative act of termination", any theoretical presumption thereupon disappears from the case. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333-334 (1952); *Hyde* v. *United States*, 225 U.S. 347 (1911); *United States* v. *Rollnick*, 91 F.2d 911 (2d Cir. 1937).

Such a rebuttal has occurred in this case in two ways. First, Dart's counsel in the court below took the affirmative position that the illegal combination shown

by the Government record had been discontinued in 1956 (see p. 7 *supra*). Secondly, the very record that is said to give rise to the presumption contains specific findings that the combination was affirmatively abandoned and discontinued in 1956 and that there was in effect a contemporaneous "public announcement" of that termination by Parke, Davis in 1956.[1] In short, the presumption does not arise in law and it is legally rebutted by the facts.

IV. PARKE, DAVIS' REFUSAL TO DEAL IN 1957, NOT HAVING BEEN ATTENDED BY ANY UNLAWFUL AGREEMENT OR COLLABORATION, COULD NOT HAVE VIOLATED SECTION 1 OF THE SHERMAN ACT, REGARDLESS OF THE MOTIVE WHICH PROMPTED IT

It has long been an established principle of law that a businessman is privileged to deal, or to refuse to deal, with whomsoever he pleases. This basic right of a manufacturer to select his own customers, on any basis he wants, was recognized at common law, *Green* v. *Victor Talking Machine Co.*, 24 F.2d 378, 382 (2d Cir. 1928), and was long ago recognized in cases construing Section 1 of the Sherman Act. The landmark antitrust case is *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), in which a manufacturer had refused to deal with a customer who was reselling the manufacturer's products at discount prices. Saying that the manufacturer "can sell to whom he pleases", the Supreme Court squarely held that such a unilateral refusal to deal, even for price-cutting reasons, does not violate the Sherman Act's prohibition against com-

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[1] As to the Supreme Court's prior comment (which was made *before* these findings) that there was no indication that Parke, Davis had "announced" the termination of the illegal practices, see note 1, p. 10 *supra*.

binations and conspiracies in restraint of trade. As the Supreme Court reiterated in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43 (1960), under the *Colgate* doctrine a manufacturer has a "right 'freely to exercise his own independent discretion as to parties with whom he will deal'."

In the years since *Colgate* the courts have surrounded this general principle with a variety of qualifications. To begin with, if a refusal to deal is an act of monopolization or done pursuant to an attempt to monopolize, it may violate Section 2 of the Sherman Act, even though it does not violate Section 1. *Lorain Journal Company* v. *United States*, 342 U.S. 143 (1951); see also *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F.2d 725, 727 (3d Cir. 1962). In this case, of course, there has been no allegation of a violation of Section 2.

Secondly, in *Parke, Davis* the Supreme Court held that a refusal to deal may violate Section 1 if it is used as a device to further or enforce an existing unlawful scheme currently being carried out by a manufacturer through collaboration with others. When Parke, Davis talked to the wholesalers and retailers and procured their cooperation in its 1956 price maintenance scheme, the Supreme Court said, Parke, Davis went "beyond" the bounds of *Colgate* and, by thus employing "other means" than simple refusals to deal, created an illegal "combination". 362 U.S. at 44. Similarly, in the other cases upon which appellants here rely, at the time the manufacturer refused to deal with the plaintiff-customer, the manufacturer was concurrently trying to maintain resale prices generally and in so doing was getting assistance from or collaborating with other customers who were participating

in the scheme. *Girardi* v. *Gates Rubber Co.*, 325 F.2d 196 (9th Cir. 1963); *A. C. Becken Co.* v. *Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960). Indeed, the parties here seem to be in substantial agreement as to the teaching of the cases in this field: *if* Parke, Davis in December 1957 had been currently engaged in a program to maintain resale prices, and *if* it had been collaborating with its other customers in seeking to achieve that objective, its 1957 refusal to deal with Dart would have violated the law.

But there was no such program in existence in December 1957 and there was no such collaboration. Although there had been in July and August 1956, such activities had long since ceased. The 1957 refusal to deal simply did not go beyond the bounds of *Colgate*. On the contrary, it fell squarely within the rule, reiterated in *Parke, Davis*, that "a *simple* refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act." 362 U.S. at 43 (emphasis added).

Since illegality, if any, can be found only from the fact of an existing illegal plan and collaboration with others, it follows that where the refusal to deal is a "simple" one (or, as appellants put it, where it is a refusal of "Doric simplicity"), the motive which prompted the refusal to deal is wholly irrelevant. Thus a simple refusal is not rendered illegal merely because it was prompted by the customer's refusal to adhere to suggested resale prices, as in *Colgate*, or his refusal to agree not to handle competitive products, *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), or his refusal to join an allegedly discriminatory pricing plan. *Alexander* v. *Texas Co.*, 149 F. Supp. 37 (W.D.

La. 1957). As observed by the Court of Appeals for the Fifth Circuit in *Nelson, supra,*

> ". . . it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself. *U. S.* v. *Colgate & Co.*, 250 U.S. 300 . . . ." 200 F.2d at 915.

Dart's legal position, therefore, is not improved by its repeated suggestions of various evil purposes which might have motivated Parke, Davis' 1957 action. Leaving aside the valid objection that with one exception none of these allegations was called to the District Court's attention when the case was presented below, the allegations are irrelevant as a matter of law.

This is particularly true of appellants' allegation that the 1957 refusal to deal was prompted by a desire "to penalize Dart for the role its president had played in the prosecution of the criminal action" and that it was therefore "an act of retaliation" (see generally Brief for Appellants, pp. 21-24). In *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962), upon which appellants rely, a manufacturer (Simplicity) had refused to deal with certain plaintiff-customers who had filed antitrust complaints against it. The treble-damage plaintiffs there contended that the retaliatory refusal was "directly contrary to the public policy enunciated by Congress . . . for the enforcement" of the antitrust laws, 191 F. Supp. at 59—just as Dart contends here that the 1957 refusal to deal "does violence to the policy of the Sherman Act" and "tends to undermine the basic scheme for enforcement of our nation's antitrust laws" (Brief for Appellants, pp. 22, 24). The District Court in that case agreed. Having found as a fact that "the sole motivation for Simplicity's refusal to deal . . .

was its desire to retaliate" for the plaintiffs' antitrust complaints (see 298 F.2d at 869), it concluded that the refusal would "frustrate the public policy" in favor of antitrust enforcement, 191 F. Supp. at 61, and on that basis it held—as appellants would have this Court hold—that "this refusal to deal was itself a violation of the antitrust laws." 298 F.2d at 869.

The Court of Appeals for the Second Circuit, however, unanimously reversed. It pointed out that Simplicity could have violated Section 1 of the Sherman Act only by being a party to a "contract, combination, * * * or conspiracy" with others, while in fact Simplicity's refusal to deal was a unilateral act of "Doric simplicity". 298 F.2d at 870. Under *Colgate*, the court said, such "a mere unilateral act . . . could not violate Section 1 irrespective of the manufacturer's motives", and nothing in subsequent decisions (including the very decisions upon which appellants here rely) was to the contrary.[1] *Ibid.* Furthermore, the court added, Congress itself had "rejected a provision which would have prohibited arbitrary refusals to sell" because of its "dangerous" ramifications,[2] and under such circumstances,

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[1] The court reviewed *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922), *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85 (1920), *George W. Warner & Co.* v. *Black & Decker Mfg. Co.*, 277 F. 2d 787 (2d Cir. 1960), and *United States* v. *Parke, Davis, & Co.*, 362 U.S. 29 (1960). See Brief for Appellants, p. 14.

[2] The court cited S. Rep. No. 698, 63d Cong., 2d Sess. 44 (1914), which states that ". . . such an enactment, which would practically compel owners of the products named to sell to anyone or else decline to do so at the peril of incurring heavy penalties, would project us into a field of legislation at once untried, complicated, and dangerous."

> "... we cannot justify, through improper judicial 'interpretation' of a section of the antitrust laws, what amounts to an extension of the remedies given by Congress under the Sherman and Clayton Acts." 298 F.2d at 871.

It was accordingly held that Simplicity's unilateral (though retaliatory) refusal to deal was not a violation of Section 1 of the Sherman Act.

Simplicity Pattern is squarely applicable here. Although it is conceivable that a simple unilateral refusal to deal which was designed to intimidate witnesses or otherwise obstruct justice might give rise to liabilities under some other provision of law,[1] such a refusal could not possibly support a treble-damage claim as a violation of the prohibition of Section 1 of the Sherman Act against combinations and conspiracies in restraint of trade.

CONCLUSION

The findings upon which appellants relied below, viewed in the light most favorable to them, established only that in December 1957 a manufacturer exercised

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[1] The court in *Simplicity Pattern* recognized that under certain circumstances a refusal to deal might tend to interfere with the orderly administration of justice and that in such a case (which was not presented) the court, in the exercise of its general equity powers, might enjoin the refusal. 298 F. 2d at 871. Compare Bergen Drug Co. v. Parke, Davis & Co., 307 F. 2d 125 (3d Cir. 1962), in which a refusal to deal which occurred during the pendency of a lawsuit between the same parties was temporarily enjoined in order to prevent interference with the court's processes (just as the court might have temporarily enjoined any other conduct which tended to interfere with the orderly progress of a pending case). There was no claim in *Bergen* that the refusal to deal provided a basis for a treble damage claim as a violation of Section 1 of the Sherman Act, and the court did not so hold.

his privilege to terminate his dealings with a customer. Since appellants alleged no surrounding circumstances, either in their complaint or in their motion for summary judgment, which would render that unilateral refusal unlawful under Section 1 of the Sherman Act, appellants simply did not state a claim upon which treble-damage relief could be granted. For this reason the decision of the District Court was correct and must be affirmed.

Respectfully submitted,

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April 1, 1964

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1064-57

UNITED STATES OF AMERICA, *Plaintiff*,

v.

PARKE, DAVIS & COMPANY, *Defendant*.

Findings of Fact

The defendant having offered evidence relating solely to the issue of the propriety of injunctive relief on June 6, 1960, and the plaintiff having presented no further evidence, the Court makes the following Findings of Fact and Conclusions of Law in accordance with its oral opinion of July 5, 1960. These Findings supplement those entered by the Court on July 16, 1958. (164 Fed. Supp. 827).

1. Prior to July, 1956, the defendant Parke, Davis, in order to promote the sale of its products in non-Fair Trade areas, had sought to encourage the retail sale of its products in such areas at prices not less than the minimum retail prices suggested in Parke, Davis's catalog. In the summer of 1956 in Washington, D. C., and Virginia Parke, Davis was confronted with a price-cutting situation such as the company had never encountered before. (Tr. 10). In response to that situation, as more fully described in the Court's Findings of July 16, 1958, Parke, Davis in July and August, 1956, engaged in activity whose purpose was to discourage certain retail drugstores in Washington, D. C., and Virginia from selling and advertising Parke, Davis products at less than the suggested minimum retail prices. This activity, whose legality has been challenged in this action, was undertaken pursuant to a then existing Parke, Davis sales policy under which Parke, Davis would refuse to sell its products in a non-Fair Trade

area (a) to a retail drugstore which was selling Parke, Davis products at less than the suggested minimum retail prices, and (b) to any wholesale distributor which was supplying such a retail drugstore with Parke, Davis products. (Findings of July 16, 1958; Tr. 8-10).

2. Prior to July, 1956, Parke, Davis's sales officials consulted counsel as to the legality of the foregoing sales policy and were advised that the policy was lawful. At the time the challenged price maintenance activity occurred, the responsible Parke, Davis officials, relying upon the foregoing advice of counsel, believed the activity to be lawful. (Tr. 17-18; GX 16).

3. In the fall of 1956 Parke, Davis officials came to the conclusion, on the basis of practical experience in Washington, D. C., Virginia, and elsewhere, that the sales policy and activity undertaken pursuant thereto did not, and would not in the future, effectively discourage the retail sale and advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 12-13). In the same period Parke, Davis's sales officials were advised that Parke, Davis's leading competitors were making no effort to discourage retail sales of their products at less than their suggested minimum retail prices in non-Fair Trade areas, and it thus became apparent to Parke, Davis that its sales policy, if pursued, would not only fail to accomplish its purpose but would actually subject Parke, Davis products to a competitive disadvantage. (Tr. 12-13, 18).

4. In the summer and fall of 1956 the Parke, Davis officials responsible for framing Parke, Davis's sales policies held a series of conferences at which they reviewed the considerations set forth in Paragraph 3 above. (Tr. 11-12.) In January, 1957, in response to these considerations, the Parke, Davis officials decided that the sales policy described above should be abandoned at once and that Parke, Davis should in the future take no action to

discourage the retail sale or advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 12-13).

5. The considerations in favor of the abandonment of the sales policy were discussed with Parke, Davis's field personnel in December, 1956. In January, 1957, Parke, Davis's field personnel in non-Fair Trade areas were instructed to make no further effort to discourage retail sales of Parke, Davis products at less than suggested minimum retail prices in such areas, and these instructions have remained in effect ever since. (Tr. 12-14, 15).

6. The decision and the instructions described in paragraphs 4 and 5 above were made and given more than three months before any legal action was instituted by the plaintiff with respect to the challenged price maintenance activity. Parke, Davis's Vice President and Director of United States Sales, who was responsible for the change in policy, testified that the decision to abandon the prior sales policy and activity pursuant thereto was not prompted by the fact that the plaintiff had instituted an investigation of the challenged price maintenance activity. (Tr. 15-16).

7. At no time since January, 1957, either before or after the decisions of this Court in companion Criminal Action No. 444-57 and this case, has Parke, Davis considered or taken any action to reestablish the sales policy hereinbefore described or to discourage, by refusals to sell or otherwise, the retail sale or advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 14-15, 16-17).

8. Since January, 1957, Parke, Davis has regularly and continuously made sales in non-Fair Trade areas, including Washington, D. C., and Virginia, (a) to retail drugstores which were and are selling and advertising Parke, Davis products at less than suggested minimum retail prices, and (b) to wholesale distributors who were and are selling Parke, Davis products to such retail drugstores.

9. Since January, 1957, retail drugstores in Washington, D. C., and Virginia have regularly and continuously advertised Parke, Davis products for sale at less than Parke, Davis's suggested minimum retail prices and made sales according to the terms of such advertisement. (DX 1, 2, 3).

10. Parke, Davis at this time has no intention of re-establishing the sales policy hereinbefore described or of taking any action, by refusals to sell, to discourage the retail sale or advertisement of Parke, Davis products at less than suggested minimum retail prices in non-Fair Trade areas. (Tr. 18).

11. In view of the ineffectiveness, competitive disadvantages, and abandonment of the prior sales policy, which was intended, but failed, to promote the sales of Parke, Davis products in non-Fair Trade areas, Parke, Davis is currently attempting to develop new methods of promoting such sales. The new promotion methods under development are based upon the assumption that Parke, Davis products will continue to be sold and advertised at less than suggested minimum retail prices in non-Fair Trade areas in the future. (Tr. 19).

12. Parke, Davis's sales to the drug firms (retail and wholesale) who were affected by the challenged price maintenance activity, which activity lasted for only two months (July and August 1956), constituted substantially less than 2% of Parke, Davis's total sales in 1956 and subsequent years. (Tr. 19-20).

13. Neither the adoption of the prior sales policy before July, 1956, nor its abandonment in January, 1957, was the subject of any express public announcement by Parke, Davis. (Tr. 25, 27). However, the regular and continuous retail sale and advertisement of Parke, Davis products at less than suggested minimum retail prices in Washington, D. C., and Virginia since January, 1957, has in effect served as a public announcement that Parke, Davis's prod-

ucts may be sold and advertised without interference by Parke, Davis. (DX 1, 2, 3).

14. The evidence as a whole and the particular facts found in Paragraphs 1-13 above demonstrate that there is now no dangerous probability, or even any reasonable probability or likelihood, that the prior sales policy, the challenged price maintenance activity, or any other activity pursuant to the policy, will in the future be resumed or undertaken by the defendant in Washington, D. C., Virginia or elsewhere.

Conclusions of Law

1. Since on the record as a whole the plaintiff is not entitled to the relief it seeks, and

2. In view of the Supplementary Findings of Fact and under settled principles of equity, the injunctive relief sought by the plaintiff would be unnecessary and inappropriate, it is therefore denied.

/s/ Joseph R. Jackson
Judge

July 18, 1960